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No. 08-

In the Supreme Court of the United States

Our Children's Earth Foundation
and Ecological Rights Foundation,
Petitioners,
v.
United States Environmental Protection Agency,
et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the federal courts employ traditional tools of statutory construction to construct a administrative agency mandatory statutory duty when a statute "strongly suggests" but "does not expressly and unequivocally state" that the agency has a mandatory duty?

2. Has EPA violated its mandatory Clean Water Act (CWA) duty in adopting an effluent guidelines limitations (ELGs) review methodology that amounts to "ignoring Congress' mandate as to what the [EPA's effluent guidelines] regulations and limitations 'shall' accomplish" and reflects an interpretation of the CWA that "strains credulity to the breaking point," "makes no sense?"

PARTIES TO THE PROCEEDING

In accord with Rule 29.6, Petitioner Our Children's Earth Foundation ("OCE") states that it is a non-profit public benefit corporation with offices in San Francisco, California and members throughout the United States. As such, OCE has no parent corporation nor does any publicly held company own 10% or more of the corporation's stock.

Petitioner Ecological Rights Foundation ("ERF") is a non-profit public interest organization public benefit corporation with offices in Garberville, California and members throughout California. As such, ERF has no parent corporation nor does any publicly held company own 10% or more of the corporation's stock.

The Respondents are the United States Environmental Protection Agency (EPA) and Steven L. Johnson, as EPA Administrator; Association of Metropolitan Sewerage Agencies; Effluent Guidelines Industry Coalition; the Utility Water Act Group (UWAG); and the National Association of Clean Water Agencies (NACWA).

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OPINIONS BELOW

The district court decision was unreported and is reproduced in the Appendix (App.) at page 59a. The court of appeals decisions are reported at 506 F.3d 781 (9th Cir. 2007) and 527 F.3d 842 (9th Cir. 2008) and are reproduced at App. 24a and 1a, respectively.

JURISDICTION

The ruling of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was issued on May 23, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Clean Water Act §§ 304(b), (m), 301(b)(2)(A)(i), (C), (D), and (F); 33 U.S.C. §§ 1314(b), (m) and 33 U.S.C. § 1311 (b)(2)(A)(i), (C), (D), and (F). They are set forth in full in the Appendix.

STATEMENT OF THE CASE

Petitioners OCE and ERF submit this Petition for *Certiorari* seeking reversal of the U.S. Court of Appeals for the Ninth Circuit's decision in *Our Children's Earth Foundation, et. al., v. United States Environmental Protection Agency, et al.*, 527 F.3d 842 (9th Cir. 2008) (*"OCE II"*)–which reversed on rehearing the Ninth Circuit's earlier published decision in *OCE v. U.S. EPA ("OCE I")*, 506 F.3d 781 (2007).

OCE II improperly reversed *OCE I*s holding that EPA has a "non-discretionary" duty reviewable under Clean Water Act ("CWA") § 505(a)(2)[1] to consider the technology-based factors set forth in CWA § 304(b) and § 301(b)[2] in EPA's reviews of CWA effluent guidelines and limitations ("ELGs"). *OCE II* created an intra- and inter-circuit split in authority in erroneously holding, contrary to its ruling in *OCE I*, that traditional principles of statutory construction and/or the framework for judicial review set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), cannot be used to determine whether a statute imposes a mandatory duty on an administrative agency. Accordingly, to re-establish long-standing rules of statutory construction as they apply to an

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[1] 33 U.S.C. § 1365(a)(2). Sections of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, are conventionally cited using the sections of the original Act, rather than the section numbers assigned after codification in the U.S. Code. This brief follows this convention. The first time Petitioners cite to a provision of the Act, a parallel citation to the U.S. Code has been included. All citations are to the CWA unless indicated otherwise.

[2] 33 U.S.C. §§ 1314(b), 1311(b).

important question of administrative law, this Court should grant *certiorari*.

I. STATUTORY BACKGROUND

Prior to 1972, federal law only regulated water pollution discharges specifically shown to be environmentally harmful. In 1972, recognizing that this approach had failed, Congress enacted sweeping new law requiring industries to meet discharge limitations based on application of the best available water pollution control technology economically achievable. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202-05 (1976).[3]

Congress further intended its new technology-based approach to institute *uniform* national standards of pollutant control, thus eliminating competitive advantages to industrial sources regulated more leniently by local authorities than comparative sources elsewhere in the country. *See NRDC v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1975).

Congress' technology-based regulatory scheme is reflected in CWA §§ 304(b), (m), and 301. CWA § 304(b) requires EPA to promulgate effluent guidelines establishing the water pollutant discharge reduction that industries can attain via the application of "best practicable technology" (BPT), "best available technology" (BAT) for toxic and non-conventional pollutants and "best conventional pollutant control technology" (BCT) for conventional pollutants. EPA must promulgate

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[3] All references "App. Xa" are to the pagination of the Petitioners' Appendix.

effluent guidelines for all categories of industries which discharge pollutants to the nation's waters. CWA § 304(b). The CWA specifies that EPA and state agencies must use effluent guidelines in setting effluent limitations required by CWA section 301(b). Such effluent limitations restrict the amount of pollution that any point source may discharge to waters. *See generally, California ex rel.*, 426 U.S. at 204.

Congress envisioned that EPA would make ELGs more stringent over time. The CWA requires EPA to have mandated BPT-based limits by 1977 and more stringent BAT and BCT-based limits by 1989. CWA § 301(b). Moreover, Congress envisioned that EPA would periodically revise its definitions of BPT, BAT and BCT to press industry to adopt more advanced pollutant reducing technologies, eventually leading to the elimination of water pollutant discharges. *See* CWA § 301(b)(2) (mandating effluent limitations that "require the elimination of discharges of all pollutants" if EPA finds "such elimination is technically and economically achievable"); *see also* CWA § 304(b)(3).

To ensure that effluent guidelines are updated to reflect current pollution control technology, Congress required EPA to review all effluent guidelines annually, and if appropriate, revise them. CWA §§ 304(b), (m)(1)(A). To ensure that revisions to effluent guidelines lead to revisions in enforceable effluent limitations, Congress further required EPA to review all BAT-based effluent limitations at least every five years and, if appropriate, revise them "pursuant to the procedure established under CWA §

301(b)(2)" for setting BAT limitations.[4] CWA § 301(d).

Congress amended the CWA in 1987 to require EPA to publish biennial effluent guidelines plans which, *inter alia*, schedule the annual review of all existing ELGs. CWA § 304(m)(1).

II. FACTUAL BACKGROUND

A. *Prior Relevant Litigation*

EPA has been persistently dilatory in adopting and revising ELGs as required by the CWA, leading to multiple citizen suits and court orders forcing EPA to act.[5] EPA did not issue its first EGP until 1990, nearly two years past CWA § 304(m)'s 1988 deadline for this plan. In this 1990 Plan, EPA contended it did not have to identify and schedule promulgations of new effluent guidelines for all categories of industries not currently regulated by effluent guidelines that discharge toxic or nonconventional pollutants. EPA contended it could limit its efforts to industries posing the greatest relative risk of environmental harm, effectively deferring effluent guideline development for

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[4] EPA has implemented CWA §§ 301(b) and 304(b) through a single set of regulations that constitute both effluent guidelines and effluent limitations. 527 F.3d at 849.

[5] *See Chemical Manufacturers Ass'n v. EPA*, 870 F.2d 177, 195, n.9 (5th Cir. 1989); *NRDC v. Train, supra*, 510 F.2d at 710-712; *NRDC v. Costle*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified sub. nom*, *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C.1976), *modified sub. nom*, *NRDC v. Gorsuch*, 17 Env't. Rep. Cas. (BNA) 2013, 12 Envtl. L. Rep. 20570 (D.D.C.1982), *modified sub. nom*; *NRDC v. Ruckelshaus*, No. 73-2153 (D.D.C. Aug. 2, 1983); 68 Fed. Reg. 75515, 75519 (Dec. 31, 2003).

unregulated categories of industry deemed by EPA to be relatively less risky. 55 Fed. Reg. 80, 81-82 (Jan. 2, 1990).

EPA's 1990 Plan was found unlawful in *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 (D.D.C. Apr. 23, 1991). The court found that "in light of the compelling need for federal effluent guidelines, the well documented history of agency inertia, and the general structure of the Act," EPA's intent to "prioritize" its promulgation of new effluent guidelines by relative ranking of risk was "inadequate and not in conformity with the mandate" of the CWA. *Id.* at *25-26. EPA subsequently entered into a consent decree, which lasted until 2004, that required EPA to schedule promulgation of a specified number of new or revised effluent guidelines.

B. *EPA's Return to Risk-Based Analysis and EPA's 2003 Review of ELGs*

1. *EPA's 2003 Review of Existing ELGs*

On December 31, 2003, EPA published its proposed effluent guidelines plan to govern EPA's first post-*Reilly* effluent guidelines review, to be conducted in 2004 and 2005. 68 Fed. Reg. 75515 (Dec. 31, 2003) ("Proposed 2004 EGP"). The Proposed 2004 EGP also described EPA's 2003 ELGs review. The Proposed 2004 EGP proposed a two-year EPA review involving a screening level analysis in the first year and a more-detailed analysis of two of EPA's 56 effluent guidelines in the second year. *Id.* at 75522.

The Proposed 2004 EGP indicated EPA had returned to the risk-based prioritization approach rejected by the court in *NRDC v. Reilly*. Specifically,

EPA indicated it planned to identify industries posing the greatest relative risk of water pollution impacts and target these industries for revision of existing effluent guidelines where such industries were already covered by effluent guidelines or adoption of new effluent guidelines where such industries were not yet regulated. Employing this methodology, EPA limited its 2003 review of ELGs to attempted identification of a small subset of categories of industry posing the greatest relative hazard to water quality. *Id.* at 75521. EPA did not evaluate whether economically achievable technology was available that would warrant more stringent ELGs for *any* categories of industries and thus reached no conclusions in this respect:

> For a number of the industries that appeared to offer the greatest potential for reducing hazard or risk to human health or the environment, EPA attempted to gather and analyze additional data *prior to commencing detailed and costly economic and technology studies.* EPA examined: (1) The pollutants driving the hazard or risk estimates; (2) the geographic distribution of facilities in the industry; (3) any discharge trends within the industry; and (4) possible links between industrial point source discharges and impaired waterbodies identified by EPA, States, and Tribal governments under CWA section 303(d).

Id. at 75523 (emphasis added).[6]

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[6] EPA explained that it had found it too difficult to compile and/or analyze technological or economic feasibility factors to screen existing ELGs. *Id.* at 0112-13; App. 82a - 84a.

In 2003, EPA further eliminated from review categories of ELGs when EPA found that: (1) there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility-by- facility basis because an industry had only a few facilities or (4) EPA had promulgated an effluent guideline for the industry within the last seven years. *Id.* at 75521, 75523; 69 Fed. Reg. 53705, 53711, 53716-17 (Sept. 2, 2004).

Employing its "screening" methodology, EPA identified only two existing ELGs for detailed evaluation in 2004.[7] 68 Fed. Reg. at 75523-24. EPA thus effectively ignored considerable information it had received, though not analyzed, on advances in water pollution abatement technology in a wide variety of industries. *Id.* at 75522-2; App. 82a - 91a. For example, EPA acknowledged that it: (1) had "Sector Notebooks" compiling pollution control technology information on 23 industry sectors, (2), had recently co-sponsored a conference devoted to identifying new water pollution abatement technologies, (3), was aware of extensive information on such technologies documented in industry trade association publications, and (4) had gathered

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[7] These were the ELGs for the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) industrial category set forth at 40 C.F.R. part 414 and the ELGs for the Petroleum Refining category set forth at 40 C.F.R. part 419.

detailed information on the pollution abatement technologies available in five industry sectors and was gathering such additional information on 15 more industry sectors. *Id.* EPA did not analyze this information, however, to reach any conclusions whether technological advances documented in such information sources might constitute basis for new definition of BPT, BAT or BCT. *Id.* at 0187; 68 Fed. Reg. at 75521.

2. *EPA's 2003 Identification of Potential New ELGs Candidates*

EPA further concluded in its 2003 review that because it could not identify any industries discharging toxic or non-conventional pollutants not already covered by existing ELGs, it would not schedule any new ELGs promulgations in its 2004 EGP. 68 Fed. Reg. at 75529. EPA acknowledged that commentors on EPA's Draft Strategy had suggested thirteen potential new categories of industries not currently regulated as targets for new ELGs. *Id.* at 75530. EPA further acknowledged that EPA itself had identified two industries not currently regulated by ELGs.[8] *Id.* at 75528-30. EPA decided not to identify these industries and schedule new ELGs promulgation for them under CWA § 304(m)(1)(B) and (C), however. *Id.* at 75529. EPA decided it need schedule new ELGs only if: (1) discharges from unregulated industries pose a significant environmental risk, (2) the industries have more than a few facilities, and (3) the

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[8] These were chemical formulating, packaging, and repackaging operations and petroleum bulk stations and terminals.

industries are not "subcategories" of industries regulated by existing ELGs. *Id.*

III. EPA'S 2004 REVIEW OF ELGS

On September 2, 2004 EPA issued its EGP for 2004 and 2005 ("2004 EGP"). 69 Fed. Reg. 53705.

A. *EPA's 2004 Review of Existing ELGs*

The 2004 EGP indicated that EPA repeated the same water quality risk-based screening level approach from 2003 to identify a small subset of industries whose ELGs EPA would consider revising in 2005. 69 Fed. Reg. at 53710. EPA's 2004 review did not examine whether economically achievable improved technologies existed for any industries besides the small subset EPA targeted in 2003 for more focused review. *Id.* The 2004 EGP stated EPA's intent to continue its risk assessment approach to "screen" which effluent guideline and effluent limitation categories should be reviewed in 2005 and 2006. *See id.* at 53717.

In 2004, EPA further copied its 2003 approach to eliminate ELGs from review when EPA determined that: (1), there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility-by-facility basis because there were only a few facilities in the industry or (4) EPA had promulgated an effluent guideline for the industry within the past seven years. *Id.* at 53716-17.

Employing its screening methodology, EPA only considered in 2004 whether revisions were appropriate for the two ELGs EPA had determined

warranted more study in 2003, plus two additional subcategories of ELGs.[9] EPA determined that two subcategories of these industries warranted further study in years ahead "for possible effluent guidelines revision." *Id.* at 53712.[10] EPA ruled out revision of the ELGs for most of these industries targeted for focused review not because EPA determined that there were no new economically achievable technologies for these industries, but because (1) the industries' discharges did not, in EPA's estimation, pose the environmental risk EPA saw as potentially possible based on its screening analysis or (2) the industries consisted of only a few facilities. *Id.* at 53712-16. EPA concluded whether more effective economically achievable pollutant reduction technology is available for only one subcategory of the 450 subcategories of industry covered by EPA ELGs (which EPA concluded there was not). *Id.* at 53712. Thus, EPA ended its 2004 review certain only that of the 450 subcategories of existing ELGs, only one still appropriately defines BPT, BAT, and BCT.

As in 2003, EPA thus effectively ignored considerable information it had on advances in

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[9] The two categories of industry were the OCPSF industry and petroleum refining. The two subcategories were chlor-alkali manufacturing, a subcategory of the inorganic chemicals industry, and the subcategory of the oil and gas extraction industry consisting of oil and gas production and exploration facilities in Cook Inlet, Alaska.

[10] The two subcategories were: the vinyl chloride manufacturing subcategory of the OCPSF category and chlor-alkali manufacturing.

pollution abatement technology for various industries. *Id.* at 53714-15; App. 82a - 91a; 68 Fed. Reg. at 75522-23. For example, EPA had a state agency study on advances in pollution abatement technology in the petroleum industry. EPA declined to analyze or reach conclusions, however, whether the technologies documented in that study warranted new definitions of BPT, BAT or BCT because EPA found it had insufficient evidence that the petroleum industry's current discharges pose risk of environmental harm. App. 82a - 91a; 69 Fed. Reg. at 53714-15; 68 Fed. Reg. at 7522-23.

B. *EPA's 2004 Identification of Potential New ELGs Candidates*

EPA identified in its 2004 EGP two industries not yet regulated by existing ELGs, hence candidates for new ELGs.[11] 69 Fed. Reg. at 53719-20. Even for these new categories, however, EPA did not set a schedule for enacting new ELGs within three years as specified by CWA § 304(m)(1)(C). EPA indicated it would commence rulemaking proceedings for new ELGs for these industries, but EPA expressly reserved the possibility of not completing the rulemaking. *Id.* at 53719. EPA further reiterated its view that it had discretion not to schedule promulgation of new ELGs for industries currently lacking ELGs that discharge toxic and nonconventional pollutants under CWA § 304(m)(1)(B) and (C). *Id.* at 53718-19.

IV. EPA'S 2005 REVIEW OF ELGS

EPA's 2005 review of existing ELGs copied the

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[11] The industries were airport deicing operations and drinking water supply and treatment.

same risk-based screening methodology EPA employed in 2003 and 2004. EPA again ruled out revision of ELGs based on EPA's finding that an industry posed relatively less risk of receiving water harm than the couple industries EPA deemed posed the most risk. 70 Fed. Reg. 51042, 51047-500 (Aug. 29, 2005). EPA ran into the same risk assessment problems it had in 2003 and 2004, often conceding that data available to it was inconclusive on whether an industry is actually posing receiving water risks. *Id.* at 51052. EPA again conceded it mostly had failed to examine whether technologies currently serving as the basis for BAT and BCT in existing ELGs had been superseded by more modern pollutant reduction technologies. EPA did *start* such a technology-based analysis for two categories of industry, but EPA was unable to even complete those two analyses. *Id.* at 51049. Thus, EPA reached no conclusions after its 2005 review whether *any* of its ELGs still appropriately define BPT, BAT and BCT and did not commence any new ELGs promulgation based on its 2005 review.

EPA's 2005 review of industry candidates for new ELGs similarly copied EPA's approach in 2003 and 2004. EPA again deemed it could decline to schedule new effluent guideline promulgation for currently unregulated industries if: (1) EPA has not found these industries' discharges not to pose substantial risk of receiving water harm, (2) the industry consists of only a few facilities, or (3) the industries are within "subcategories" of existing ELGs. On these bases, EPA did not schedule any new ELGs promulgation. *Id.* at 51056-57.

V. THE NINTH CIRCUIT'S CONFLICTING DECISIONS

A. *OCE I*

In *OCE I*, the Ninth Circuit held that EPA has a non-discretionary CWA duty to consider technology-based factors set forth in CWA § 304(b) and § 301(b) when determining whether to revise ELGs. The Ninth Circuit noted that "the overall structure of the Act strongly counsels that any review to determine whether revision is appropriate must contemplate the mandatory technology-based factors," set forth in CWA § 304(b) and § 301(b), though the Ninth Circuit further found that "the statute does not expressly and unequivocally state as much." 506 F.3d at 792. The Ninth Circuit proceeded alternately to employ traditional principles of statutory construction and/or the second step of the *Chevron* framework to find EPA has a nondiscretionary duty to consider these CWA § 304(b) and § 301(d) factors when reviewing ELGs. 506 F.3d at 792-93.

The Ninth Circuit's majority opinion in *OCE I* noted the dissentor's criticism of its use of the *Chevron* framework, but deflected this criticism by noting, one, that it would reach the same result under traditional principles of statutory construction or the *Chevron* framework–and that the latter only "gives the EPA the benefit of any ambiguity or doubt in analyzing these interlocking statutory provisions." *Id.* at 792.

In construing the CWA statutory provisions in issue, in keeping with traditional principles of statutory construction and step one of the *Chevron* framework, the Ninth Circuit first considered the

facial meaning of these provisions. The Ninth Circuit found that it was a close question whether these provisions had a facially plain unambiguous meaning:

> The statute *all but explicitly states* that the review is governed by the revision standards [set forth in CWA section 304(b)].

Id. at 792 (emphasis added).

The Ninth Circuit proceeded to point out that when the provisions in issue where looked at in context, "The only reasonable interpretation of the . . . provisions is that they tie the review and revision to § 304(b) and § 301(b), respectively, both of which mandate a technology-based approach." *Id.*

Second, the Ninth Circuit looked at "the common sense reading of the Statute" and found that "[i]t makes no sense that Congress would require promulgation and revision tethered to technology-based requirements, but would somehow silently render discretionary the choice as to whether to review in light of the statutorily-required technological criteria." *Id.* at 792-93.

Third, the Ninth Circuit examined EPA's past interpretation of the CWA and noted that EPA had previously believed it was required to consider CWA § 304(b) and § 301(b)'s technology-based factors when completing its ELGs reviews. *Id.* at 793.

Fourth, the Ninth Circuit noted that CWA legislative history reveals that Congress intended the CWA to force the advancement of pollution control technology with the goal of eliminating the discharge of pollutants altogether, rather than simply attempting to reduce the relatively greatest pollution risks:

> [legislative history] demonstrate[s] that a fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent.

Id. at 794.

Employing these traditional statutory construction tools, the Ninth Circuit concluded that "[a]lthough the EPA may determine in its exercise of discretion that no revision is appropriate, in conducting its review to reach that decision, the Agency must attend to the technology-based factors specifically prescribed by the CWA." *Id.* at 795.

B. *OCE II*

In *OCE II*, the Ninth Circuit reaffirmed its observations that the CWA plainly intended that EPA review and consider the capabilities of pollution reducing technologies in promulgating ELGs:

> The plain language of these [relevant CWA] provisions reflects that the CWA repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the [EPA ELG] regulations, at least as one methodology among others.

527 F.3d at 850.

The Ninth Circuit also reaffirmed that the CWA plainly mandates that EPA revise ELGs to keep pace with technological innovation allowing for greater pollution reduction:

> Further, the statute makes clear that the regulations must comport with technological criteria that change over time. The statutory language is unambiguous that *revision* decisions, although discretionary as indicated

> by the "if appropriate" language, are constrained by the statute's mandate as to what "such regulations" "shall" accomplish. The statute states that the regulations "shall" account for the technological factors without distinguishing between promulgation and revision.

Id. at 850-51

Finally, the Ninth Circuit again observed that "the overall structure of the [Clean Water] Act strongly suggests that any *review* to determine whether revision [of ELGs] is appropriate should contemplate the mandatory technology-based factors" set forth in CWA section 304(b) that EPA must consider when promulgating new or revised ELGs. *Id.* at 851. The Ninth Circuit reversed its *OCE I* decision, however, based on a conclusion that the CWA "does not expressly and unequivocally state" that EPA must consider CWA section 304(b)'s technology-based factors or otherwise consider the capabilities of currently available technologies in deciding whether to update ELGs. *Id.* The court further held that it could only find that EPA had a mandatory duty to consider CWA section 304(b)'s technology-based factors or otherwise consider the capabilities of currently available technologies in deciding whether to update ELGs if the CWA's language contained such a facially unequivocal command. *Id.*

REASONS FOR GRANTING THE WRIT

I. WHEREAS OCE I PROPERLY EMPLOYED TRADITIONAL STATUTORY CONSTRUCTION RULES, OCE II FAILED TO DO SO.

In *OCE I*, the Ninth Circuit correctly employed traditional tools of statutory construction and/or the *Chevron* second step framework in holding that EPA has a "non-discretionary" duty to consider the technology-based factors set forth in CWA § 304(b) and § 301(b) in its required reviews of ELGs. As this Court has instructed:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843 n.9 (citations omitted) (emphasis added). *See also Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1131 (9th Cir. 2007) (Agency statutory "[c]onstructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected.").

In *OCE I*, the Ninth Circuit simply followed this *Chevron* instruction in employing the following traditional tools of statutory construction: (1), a review of the whole context of the CWA statutory language, (2), a common sense reading of the whole statute, i.e., an analysis of what Congress meant the

CWA to accomplish and how, (3), consideration of EPA's prior inconsistent interpretation of the CWA provisions in issue, and (4), applicable legislative history. 506 F.3d at 792-93. Employing these tools, the Ninth Circuit ascertained a "clear congressional intent" within the meaning of *Chevron* that EPA *must* consider the technology-based criteria in CWA § 304(b) and § 301(b) in reviewing its ELGs. *Id.* at 792-95.

In *Chevron*, this Court further instructed that if after considering traditional principles of statutory construction, the proper conclusion is that "Congress did not actually have an intent regarding the" statutory provision in issue, then the Ninth Circuits must defer to an agency's interpretation of a statute it administers if this interpretation "is a reasonable one." 467 U.S. at 845; *see also Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 481(2001); *Hogarth*, 484 F.3d at 1131 ("Deference is due only to a 'reasonable interpretation'" of a statute by a federal agency). This is commonly referred to as the second step of the *Chevron* framework. *See, e.g.,* 506 F.3d at 792. In *OCE I*, the Ninth Circuit noted that even if EPA were to be given the benefit of the doubt called for by the *Chevron* second step framework, "the result is the same" because EPA's interpretation of the relevant CWA provisions is unreasonable. *Id.*

OCE I followed a frequent and familiar approach. Indeed, prior to *OCE II*, no court of appeals decision held that the courts may not employ traditional statutory construction tools and/or a *Chevron* second step analysis to determine whether an agency's statutory obligations are mandatory. Instead, numerous decisions routinely employed the

same traditional principles of statutory construction and/or a *Chevron* second step analysis to determine whether a statute evinces a "clear congressional intent" to impose mandatory duties on federal agencies. For example, the Ninth Circuit recently followed just this approach in *S.F. BayKeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). In *BayKeeper*, the Ninth Circuit found CWA § 303(d) facially unclear as to whether EPA had a mandatory duty to establish certain "total maximum daily loads" on allowable pollutant discharge. The Ninth Circuit employed a *Chevron* second step analysis to determine whether EPA's interpretation that it lacked such a mandatory duty was reasonable. *Id.* Courts of Appeals in other circuits have followed the same approach. In *Environmental Defense Fund v. Thomas*, the Second Circuit employed traditional tools of statutory construction, including review of applicable legislative history, to determine that the district court had jurisdiction to compel the Administrator to fulfill his Clean Air Act ("CAA") mandatory duty to make some formal decision as to whether or not to revise certain air pollution regulations. 870 F.2d 892, 900 (2nd Cir. 1989). In *Dubois v. Thomas*, the Eighth Circuit, finding CWA § 309 not facially determinative as to whether EPA has a mandatory enforcement duty, reviewed the legislative history and then resorted to a *Chevron* second step analysis to determine this mandatory duty question. 820 F.2d 943, 948-49 (8th Cir. 1987); *see also Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278, n. 6 (4th Cir. 1992) ("the existence of a nondiscretionary duty could be recognized through application of *Chevron's* rule of construction."); *see*

also National Resources Defense Council v. EPA ,437 F. Supp.2d 1137, 1157-62 (C.D. Cal. 2006) (employing traditional rules of statutory construction, including consideration of overall statutory purpose and applicable legislative history, and *Chevron* second step consideration of reasonableness of EPA interpretation to determine if EPA had failed to comply with a nondiscretionary duty to promulgate certain ELGs); *Sierra Club v. Browner*, 130 F. Supp.2d 78, 90 (D.D.C. 2001) (*Chevron* review is appropriate when citizen brings suit claiming agency has failed to perform nondiscretionary duty); *Save the Valley, Inc. v. EPA*, 99 F. Supp.2d 981, 984-86 (S.D. Ind. 2000) (examining legislative history to construe ambiguous CWA § 309 to impose mandatory duty on EPA to enforce the CWA); *Environmental Defense Fund, Inc. v. Browner*, 1995 WL 91324, *2 (N.D. Cal. 1995) (engaging in *Chevron* second step review to determine if the Agency had failed to comply with a CAA nondiscretionary duty to promulgate certain rules by required deadline).

In *Sierra Club v. Train*, the Fifth Circuit found that it could not resolve whether EPA has a nondiscretionary duty to enforce the CWA based solely on the statutory language. 557 F.2d 485 (5th Cir. 1977). Noting that "[t]he substantive issue in this case is one of statutory construction," the Fifth Circuit then turned to the same "extrinsic aids" utilized by the Ninth Circuit in *OCE I* but rejected by the Ninth Circuit in *OCE II*: the "administrative agency's interpretation, along with the legislative history and the statute as a whole." *Id.* at 489. For additional example, in *NRDC v. Train*, the D.C.

Circuit found CWA § 304(b)(1)(A) ambiguous as to whether EPA had a nondiscretionary duty to promulgate certain ELGs by 1973. 510 F.2d at 706-710. The D.C. Circuit turned to legislative history to discern what part of EPA's duty was mandatory: "It is our view that the Act *and its legislative history* rein in the Administrator's discretion." *Id.* at 706 (emphasis added).

OCE II relies upon the Ninth Circuit's contrary reading of a single case, *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). The Ninth Circuit's *OCE II* decision, however, misconstrues that case. In *Thomas*, the D.C. Circuit expressly acknowledged that a mandatory duty need not be expressly stated by a statute, but instead can be, in some circumstances, implied by a statute. *Id.* at 791. The D.C. Circuit did hold that it could not infer a mandatory duty from the "from the overall scheme" of the specific Clean Air Act provisions in issue in that case, not because the court found it always improper *per se* when faced with an ambiguous statute to construct a mandatory duty using traditional statutory construction tools, but because the CAA provisions in issue did not lend themselves to such a construction. In *Thomas*, the D.C. Circuit faced a narrow type of mandatory duty issue *not at issue in this case*: whether agency delay in promulgating regulations can constitute breach of a mandatory duty or at most unreasonable delay in performing a discretionary duty when a statute contains no explicit deadline for promulgating the regulations. As the D.C. Circuit pointed out, finding that an agency has a mandatory duty to promulgate regulations when Congress has created no "readily

ascertainable" deadline for action is essentially akin to holding that an agency has a mandatory duty not to unreasonably delay its action. To hold that agencies have a mandatory duty not to unreasonably delay would be no different, at the end of the day, from holding that agencies have a mandatory duty not to abuse their discretion. This would, of course, make every administrative action necessarily a mandatory duty–thus negating the long-recognized distinction between claims for mandatory breach and abuse of discretion. *Id.* at 792. In contrast to *Thomas*, upholding Petitioners' claim in this case does not require transforming all administrative actions into mandatory duties. Petitioners here argue only that EPA must consider certain criteria, set out by Congress in CWA section 304(b), in performing ELG reviews that the CWA mandates be performed by a date certain: once every year. Using traditional tools of statutory construction to transform the CWA's "strong suggestion" that EPA consider these criteria in performing EPA's ELG reviews into an EPA mandatory duty would not, as in *Thomas*, lead to all administrative actions being viewed as mandatory duties.[12]

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[12] The dissent in *OCE I* (though not the Ninth Circuit decision in *OCE II*) also sought to rely on *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989), but this reliance, too, was misplaced. *Farmers* noted, without expressly agreeing, that some Courts have found that only "a clear-cut" nondiscretionary duty gives rise to CAA citizen suit jurisdiction. The decision says nothing, however, about *how* Courts are to determine whether nondiscretionary duties are clear-cut and certainly does not support that Courts may not employ traditional statutory construction tools or *Chevron* Second Step analysis to find such duties.

II. OCE I CORRECTLY APPLIED STATUTORY CONSTRUCTION RULES, AND THE COURT SHOULD REINSTATE OCE I'S RULING.

As noted, in *OCE I*, the Ninth Circuit did not defer to EPA's interpretation of the CWA provisions in issue because this interpretation ignored the statute's whole context, common sense reading and applicable legislative history and furthermore was inconsistent with prior EPA interpretations. 506 F.3d at 792-93. *OCE II* did not reverse or criticize *how* the Ninth Circuit used traditional statutory construction tools and/or *Chevron* second step analysis in *OCE I*. *OCE II* merely found it unnecessary to use traditional statutory construction tools and/or conduct *Chevron* second step analysis. *See* 527 F.3d at 851.

Thus, *OCE II* essentially left intact that EPA's statutory interpretation of the CWA, once examined using traditional statutory construction tools or the *Chevron* second step framework, "strains credulity to the breaking point," "makes no sense," and amounts to "ignoring Congress' mandate as to what the [EPA's effluent guidelines] regulations and limitations 'shall' accomplish"–requiring industries to limit their pollution discharges to the level achievable with up-to-date technologies. 506 F.3d at 795, 792-93. Thus, *OCE II* now leaves judicial power so truncated as to allow EPA the latitude to administer the CWA in a fashion grossly at odds with clear congressional intent–as revealed by well-familiar tools of statutory construction–simply

because halting this EPA approach would require looking beyond the immediate clauses of the statute in issue to construct a mandatory duty using those tools. This radical truncation of judicial review must be rejected. As discussed above, *OCE II* departed from ample precedent in rejecting that traditional statutory construction tools and/or the *Chevron* second step framework could and should be used to construct a mandatory EPA duty reflective of Congress's clear intent.

III. EPA'S NONDISCRETIONARY DUTY INCLUDES CONSIDERING TECHNOLOGY-BASED FACTORS IN REVIEWING ELGs.

Before the Ninth Circuit, EPA erroneously argued that, under CWA § 505, a district court's jurisdiction extends only to ordering it to do an ELG review, but not to directing it as to whether to consider CWA § 304(b) and § 301(b)'s technology-based criteria in performing this review. EPA ignored *Bennett v. Spear*'s directive "that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." 520 U.S. 154, 172 (1997); *see* 506 F.3d at 793; *see also Hogarth,* 484 F.3d at 1131 (agency "may not ignore factors Congress required be taken into account"). In sum, the Ninth Circuit in *OCE I* heeded well-established rules in finding that EPA mandatory duties, and thus CWA § 505 jurisdiction, extend to considering factors that Congress mandated EPA to consider when reaching an ultimately discretionary decision. *See also Florida PIRG v. EPA*, 386 F.3d 1070, 1087-88 (11th Cir. 2004) (EPA has mandatory duty to consider

statutory criteria for decisions as "the only way in which the EPA can satisfy a mandatory duty is by actually discharging that obligation in the manner specifically required by the statute."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971) (in reviewing agency action "the Ninth Circuit must consider whether the decision was based on a consideration of the relevant factors.")

IV. EPA'S ELG REVIEW IS A JUDICIALLY REVIEWABLE ACTION.

Before the Ninth Circuit, EPA erroneously argued that under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65-72 (2004) EPA's ELG review is not a reviewable "discrete action." *Norton* is not on point for several reasons, as the Ninth Circuit correctly held in *OCE I*.[13] One, *Norton* involved a challenge to a substantive agency program and held only that before such a substantive action can be challenged, it must be sufficiently narrow and "discrete." In this case, OCE is seeking review only of EPA failure to follow *mandated procedures in an environmental review*. If environmental reviews foreclose options on future specific action, such reviews themselves are reviewable final agency action even if they are broadly scoped. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1089 (9th Cir. 2003). By determining whether ELGs will be updated, EPA's ELG reviews meet this test.

Even if, however, EPA's reviews of ELGs must be "discrete" actions to be subject to review, they would qualify. BLM's perpetual efforts at issue in

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[13] The Ninth Circuit did not revisit this holding in *OCE II*.

Norton to implement broad mandates to manage vast tracts of federal land consistent with vaguely framed overall goals of balancing wilderness preservation against competing concerns is not analogous to EPA's CWA duty to review ELGs, as the Ninth Circuit correctly held. 506 F.3d at 795. Whereas BLM's amorphous actions at issue in *Norton* had no set end, the CWA gives EPA specific recurring deadlines to perform a single focused task: annually review its ELGs. Whereas the statutory provisions in *Norton* were too vague for judicial oversight, Congress has provided a clear basis for oversight in mandating that EPA consider specific criteria in reviewing EPA's discrete set of ELGs. *See also Environmental Defense Fund*, 870 F.2d at 898-900.

CONCLUSION

The Ninth Circuit's ruling in *OCE II* has created an intra- and inter-circuit split in authority in erroneously holding, contrary to its ruling in *OCE I*, that traditional principles of statutory construction and/or the framework for judicial review cannot be used to determine whether a statute imposes a mandatory duty on an administrative agency. Accordingly, to re-establish long-standing rules of statutory construction as they apply to an important question of administrative law, this Court should grant *certiorari*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION, and ECOLOGICAL RIGHTS FOUNDATION; ECOLOGICAL RIGHTS FOUNDATION,
Plaintiffs-Appellants,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL O. LEAVITT, Administrator of EPA; STEVEN L. JOHNSON,
Defendants-Appellees,

ASSOCIATION OF METROPOLITAN OPINION SEWERAGE AGNENCIES; EFFLUENT GUIDELINES INDUSTRY COALITION; THE UTILITY WATER ACT GROUP (UWAG); NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES (NACWA),
Defendants-Intervenors-Appellees.

No. 05-16214

D.C. No. CV-04-02132-PJH

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted

February 13, 2007—San Francisco, California

Filed May 23, 2008

Before: J. Clifford Wallace, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Christopher Sproul, Environmental Advocates, San Francisco, California, for the appellant.

Sue Ellen Wooldridge, Assistant Attorney General, Washington, DC, for the appellees.

Fredric P. Andes, Carolyn S. Hesse, and David T. Ballard, Barnes & Thornburg, L.L.P., Chicago, Illinois, for intervenorappellee Effluent Guidelines Industry Coalition.

David W. Burchmore and Jill A. Grinham, Squire, Sanders, & Dempsey L.L.P., Cleveland, Ohio, for intervenorsappellees Association of Metropolitan Sewerage Agencies, now known as National Association of Clean Water Agencies.

Melanie Shepherdson, National Resources Defense Counsel, Washington, DC, amicus in support of the appellants.

Jeffrey Odefey, Waterkeeper Alliance, Tarrytown, New York, amicus in support of the appellants.

ORDER

The petition for panel rehearing is granted. The petition for rehearing en banc is denied as moot.

The opinion filed October 29, 2007, slip op. 14215, and appearing at 506 F.3d 781, is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. It is replaced by the concurrently filed opinion.

OPINION

McKEOWN, Circuit Judge:

In 1972 Congress passed the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act of 1972), Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251(a)). Central to that legislation and later amendments is the notion that pollution discharges would be controlled through technology-based effluent limitations.

Environmental advocates, Our Children's Earth Foundation and Ecological Rights Foundation (collectively "OCE"), filed this citizen suit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, alleging that the Environmental Protection Agency ("EPA" or "the Agency") has failed to fulfill its mandate to review effluent guidelines and

limitations in a timely manner and in accord with technology-based standards. Specifically, OCE claims that EPA violated its statutorily-mandated duties by abandoning *technology-based* review in favor of *hazard based* review; neglecting to identify *new* polluting sources; and failing to publish timely plans for future reviews. *See* CWA § 301(b), 33 U.S.C. § 1311(b); CWA § 301(d), 33 U.S.C. § 1311(d); CWA § 304(b), 33 U.S.C. § 1314(b); CWA § 304(m), 33 U.S.C. § 1314(m).[1]

A technology-based approach to water quality focuses on the achievable level of pollutant reduction given current technology, whereas a hazard-based[2] approach seeks to identify known hazards or contaminants in the water and to reduce the prevalence of those hazards. *See, e.g.*, S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. 3668, 3674-78. Although these approaches are not mutually exclusive, OCE claims that EPA jettisoned a technology-based approach altogether, thus abdicating its statutory duties.

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[1] Sections of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, are conventionally cited using the sections of the original Act, rather than the section numbers assigned after codification in the U.S. Code. We follow that convention here. The first time we cite to a provision of the Act, we include a preliminary parallel citation to the U.S. Code. All citations are to the CWA unless indicated otherwise.

[2] Hazard-based regulation is also referred to in the record as waterquality-based and harm-based regulation.

The district court granted judgment in favor of EPA, holding that the challenged acts or omissions were discretionary. We agree that the decisions whether to revise the effluent guidelines and whether to incorporate technology-based criteria in its periodic review of the guidelines fall within EPA's discretion. Consequently, we affirm.

BACKGROUND

OCE's amended complaint contains four claims alleging non-compliance with what OCE characterizes as EPA's mandatory duties under the Act:

(1) EPA failed to review effluent guidelines based on the "best conventional pollutant technology" ("BCT") and "best available technology" ("BAT"), as mandated by §§ 304(b), (m);

(2) EPA failed to review existing effluent limitations as required by §§ 301(b), (d);

(3) EPA failed to issue timely final effluent guidelines plans as required by § 304(m)(1); and

(4) EPA failed to identify new polluting sources as required by § 304(m)(1)(B).

In sum, OCE argues that the CWA requires, as a nondiscretionary matter, that the Agency take a particular approach to water safety regulation: technology-based review, published in a sufficiently timely fashion to afford a meaningful opportunity for notice and comment. EPA and Intervenors Effluent

Guidelines Industry Coalition and Association of Metropolitan Sewerage Agencies (now known as the National Association of Clean Water Agencies) (together, "Intervenors") counter that EPA's non-discretionary duties do not extend to a particular manner of performing reviews and revisions.

We first address the argument by EPA and the Intervenors that this suit was not properly brought under the citizen suit provision of the Act, § 505(a), 33 U.S.C. § 1365(a)(2), but rather should have been brought under § 509(b)(1), 33 U.S.C. § 1369(b)(1). Then, we consider whether the district court has jurisdiction over each of OCE's four claims under § 505(a)(2). Because § 505(a)(2) jurisdiction is predicated on citizen enforcement of a non-discretionary duty, our analysis focuses on whether the claims relate to discretionary or nondiscretionary duties under the Act.

ANALYSIS

I. JURISDICTION TO REVIEW AGENCY ACTION[3]

[1] The CWA contains two separate

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[3] The Agency's position on jurisdiction is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*.") (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

jurisdictional sections: § 505(a), known as the citizen suit provision, and § 509(b)(1), which relates primarily to challenges to promulgation of certain standards and determinations. OCE brought suit under § 505(a)(2), which permits "any citizen [to] commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."[4] CWA § 505(a)(2).

[2] Alternatively, § 509(b)(1) permits suits against the EPA Administrator for review of action

> (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any

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[4] OCE's amended complaint also cites the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, as an alternative basis for jurisdiction, but does not allege any claims under the APA.

> individual control strategy under section 1314(l). . . .

Suits brought pursuant to § 509(b)(1) must be filed directly

> in the Circuit Court of Appeals of the United States for the Federal judicial district in which [petitioner] resides or transacts business. . . . Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

CWA § 509(b)(1). Section 509(b)(1) actions, as opposed to suits brought under § 505(a)(2), challenge the exercise of the Administrator's discretion in promulgating standards and issuing determinations.

[3] So long as EPA's challenged acts and omissions relate to non-discretionary duties under the Act, OCE's action was properly brought in the district court under § 505(a)(2). To the extent OCE challenges actions within the discretion of the Administrator, the district court properly refused to exercise jurisdiction under § 505(a)(2). Nonetheless, a jurisdictional defect under § 505(a)(2) does not mean that jurisdiction is proper under § 509(b)(1).

"[T]his Court has counseled against expansive application of section [509(b)]." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th

Cir. 2002). Section 509(b)(1) covers only challenges to "promulgation" or "approval" or "determinations" on permits, not failure to comply with allegedly mandated procedures, which is the thrust of OCE's suit.

Additionally, § 509(b)(1) lists a number of sections for which review obtains in the court of appeals: §§ 301, 1312, 304(*l*), 1316, 1317, 1342, and 1345. Neither §§ 304(b) or 304(m) is referenced in § 509(b)(1). Because the challenge here does not stem from the promulgation or approval of an effluent limitation or permit, we need not decide whether § 509(b) encompasses a challenge under § 304. *Compare E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136-37 (1977) (suggesting that the EPA could collapse the limitations to be promulgated under §§ 301 and 304 into a single review), *with Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1310 (9th Cir. 1992) (holding that the sections listed in § 509 are sufficiently specific that unlisted sections should not be interpreted to be covered by § 509).

[4] We thus agree with the district court that the circuit court's exclusive jurisdiction "extends only to a substantive review of the appropriateness of the guidelines actually promulgated, and not to the threshold question of whether the statutory requirements of the CWA have been met." No such promulgated guidelines or limitations are at issue here. The district court had jurisdiction under § 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA.

II. TECHNOLOGY-BASED REVIEW AND REVISION

In determining whether OCE's four claims challenge nondiscretionary obligations under the Act, our point of reference is the statute itself. Although the line between a congressional mandate and an area of agency discretion is not difficult to state, ascertaining that line is not always as easy. When Congress specifies an obligation and uses the word "shall," this denomination usually connotes a mandatory command. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). On the other hand, "[a]bsent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion." *Farmers Union Cent. Exch. v. Thomas*, 881 F.2d 757, 761 (9th Cir. 1989).

However, not every decision is so easily categorized. As the Supreme Court teaches, the decision-making process does not necessarily collapse into a single final decision. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In *Bennett*, considering a citizen suit provision parallel to that in the CWA, the Supreme Court held, "[s]ince it is the omission of these *required* procedures that petitioners complain of, their . . . claim is reviewable." *Id.* at 172 (emphasis added).

With these general principles in mind, we consider the CWA provisions relevant to each of OCE's claims to determine whether the particular claim relates to a mandatory obligation or discretionary agency function under the Act.

A. HISTORY OF THE CWA AND TECHNOLOGY

By way of brief overview, when the CWA was enacted in 1972, its stated goal was the elimination of all discharges of pollutants into the nation's waters by 1985. *See* CWA § 101(a)(1); 33 U.S.C. § 1251(a)(1). This goal was to be accomplished through ambitious technological improvements, because the previous water-quality based approach to pollutant control had been "limited in its success." S. Rep. No. 92- 414, at 8 (1971), 1972 U.S.C.C.A.N. at 3675. In the CWA's Declaration of Goals and Policy, Congress wrote, "it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans." CWA § 101(a)(6).

The CWA formally prohibits the "discharge of any pollutant" from any source into navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *See* CWA § 301(a). NPDES permits, issued either by the EPA, or by the states in a federally-approved permitting system, are statutorily required to set forth, at the very least, "effluent limitations"—that is, certain "restriction[s] . . . on [the] quantities, rates, and concentrations of

chemical, physical, biological, and other constituents which are discharged . . . into navigable waters." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)).

The specific effluent limitations contained in each NPDES permit are determined by the terms of more general "effluent limitation guidelines," which are separately promulgated by the EPA. The effluent limitations and the guidelines have long been understood to be determined according to the best available or practicable technology. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 121 (explaining the technology-based character of effluent limitations and guidelines); *see also Waterkeeper Alliance*, 399 F.3d at 491 ("[Effluent Limitation Guidelines], and the effluent limitations established in accordance with them, are technology-based restrictions on water pollution. They are technology-based, because they are established in accordance with various technological standards that the Act statutorily provides . . . .").

Since 1972 Congress has amended the CWA on a number of occasions. In the 1985 amendments, Congress reaffirmed its commitment to a technology-based approach to water quality regulation:

> The technology-based approach to water pollution control was adopted in 1972 because of the historical ineffectiveness of the previous water-quality-based approach. This approach failed because of uncertainties about the

> relationship between pollutant loadings and water quality and the association between water quality and health and environmental effects. There are still significant gaps in knowledge of these relationships. Consequently the reported bill reaffirms the technologically-based approach established in 1972 as an immediate and effective method of achieving the goals of the Act.

S. Comm. on Env't & Pub. Works, 99th Cong., Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 3- 4 (Comm. Print 1985).

B. THE STATUTORY FRAMEWORK

[5] Three key statutory provisions of the CWA are at issue here: §§ 301(d), 304(b) and 304(m). Section 301(d) requires EPA to review, every five years, the effluent limitations established under § 301(b)(2) and to revise such regulations "if appropriate." These processes are undergirded by a series of mandated criteria stating what the regulations "shall" contain. The mandated criteria include technology-based requirements. *See* CWA § 304. Sections 304(b) and (m) require an annual review of "guidelines for effluent limitations" applicable to direct dischargers and revision "if appropriate." As in § 301, § 304(b) includes mandated criteria that reference technology-based requirements, without differentiating between application of these criteria to promulgation, review or revision. Section 304(m) specifically provides for a schedule for review of the guidelines in accordance

with § 304(b).

According to EPA, rather than conducting separate reviews, it consolidates effluent limitations required under § 301(d) into effluent limitation guidelines under § 304(b). As EPA puts it: "through its annual review of its consolidated 'effluent limitation guidelines' EPA also reviews the effluent limitations they contain, thus meeting its review requirements under § 301(d) and § 304(b) simultaneously."

C. CRITERIA FOR REVIEW AND REVISION

It is undisputed that EPA has an obligation to review effluent guidelines and limitations for possible revision, and that such a review is mandatory. It is also undisputed that EPA's ultimate decision *whether* to revise the guidelines and limitations is discretionary, as "appropriate." And, it is undisputed that any revision must be in accord with detailed statutory criteria that incorporate variants of the best-technology standard. What remains in dispute is whether, as part of its mandated *review* process, EPA must consider the technology-based criteria. To address this question, we consider the statute itself.

[6] The Act imposes on EPA non-discretionary duties to review its current effluent limitations guidelines regulating the pollutants discharged into the nation's waters, and, "where appropriate," to revise them, according to the criteria in the statute. *See* CWA §§ 301(d); 304(b), (m). Under § 304(b), "the Administrator shall, after consultation with

appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations." The statute goes on to provide that "[s]uch regulations shall" conform to specific criteria. The requirement of a technology-based approach to promulgation and revision of regulations runs throughout the statutory text of § 304(b).

Section 304(b)(1)(A) relates:

> Such regulations shall—identify . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . . .

CWA § 304(b)(1)(A).

Section 304(b)(1)(B) relates that the regulations "shall":

> specify factors to be taken into account . . . relating to the assessment of best practicable control technology currently available . . . includ[ing] consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of

> equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques . . . . and such other factors as the Administrator deems appropriate[5].

CWA § 304(b)(1)(B).

Section 304(b)(2)(A) continues to mandate a technologybased approach, without differentiating between promulgation and revision:

> regulations shall . . . identify, . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations . . . .

CWA § 304(b)(1)(A).

Section 304(b)(4)(A) yet again requires an analysis in terms of "application of the best

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[5] This last phrase, "and such other factors as the Administrator deems appropriate," indicates, as OCE acknowledges, that the EPA could adopt additional factors for consideration, including harm or risk-based factors. The discretion to consider additional factors does not, however, render the mandatory factors optional.

conventional pollutant control technology . . . ." Each of the subsections of § 304(b) includes a mandatory requirement related to technology.

[7] Under § 304(m), EPA also has an obligation to publish a biennial plan announcing a schedule for performing the annual review and for establishing rules regarding any existing effluent guideline selected for possible revision as a consequence of the annual review. Section 304(m)(1) states in full:

> (m) Schedule for review of Guidelines
>
> (1) Publication
>
> Within 12 months after February 4, 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall—
>
> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section [specifying technology-based factors];
>
> (B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and

> (C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

CWA § 304(m)(1).

In § 301, which deals with the five year review and revision of effluent limitations, Congress wrote: "Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, *if appropriate*, revised pursuant to the procedure established under such paragraph." CWA § 301(d) (emphasis added). The crossreferenced subsection (b)(2) mandates the application of technology-based criteria in determining the applicable effluent limitations.

For example, § 301(b)(2)(A) states that effluent limitations for categories other than publicly-owned treatment works "shall require application of the best available technology economically achievable . . . ." The mandated technology based criteria run throughout the text of § 301(b). *See, e.g.*, CWA § 301(b)(1)(A) ("[E]ffluent limitations . . . shall require the application of the best practicable control technology currently available . . . ."); § 301(b)(2)(E) ("[P]ollutants

identified
. . . shall require application of the best conventional pollutant control technology . . . .").

The plain language of these provisions reflects that the CWA repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the regulations, at least as one methodology among others. Further, the statute makes clear that the regulations must comport with technological criteria that change over time. The statutory language is unambiguous that *revision* decisions, although discretionary as indicated by the "if appropriate" language, are constrained by the statute's mandate as to what "such regulations" "shall" accomplish. The statute states that the regulations "shall" account for the technological factors without distinguishing between promulgation and revision.

[8] Nonetheless, while the overall structure of the Act strongly suggests that any *review* to determine whether revision is appropriate should contemplate the mandatory technology-based factors, the statute does not expressly and unequivocally state as much. Nothing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach. At most, the statutory provisions and legislative history are ambiguous.

[9] To compel agency action under § 505(a)(2), a citizen suit must point to a nondiscretionary duty that is "readily ascertainable" and not "only [ ] the

product of a set of inferences based on the overall statutory scheme." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). The legislative and regulatory maze presented here do not meet that standard. Nor would it be appropriate for us to divine a "specific, unequivocal command," *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004), from an amalgamation of disputed statutory provisions and legislative history coupled with the EPA's own earlier interpretation. *See* Preliminary Effluent Guidelines Plan for 2004-2005, 68 Fed. Reg. 250, 75515 (EPA Dec. 31, 2003). Finally, we do not invoke the *Chevron* analysis here because we are not trying to determine whether we should defer to the EPA's interpretation of the statute, but are trying to determine whether, objectively, the statute creates a mandatory duty. In sum, the statute falls short of imposing a mandatory duty and thus the review criteria are not properly before the court under § 505(a)(2).

III. PUBLICATION SCHEDULE PROPOSED BY OCE

[10] Section 304(m) requires biennial publication of a plan for scheduling annual review and revision of the guidelines. The plan must provide for public review and comment prior to final publication. *See* CWA § 304(m)(2). OCE argues that the plan should be synchronized with the annual review, but as the district court correctly held, the Act does not require this degree of harmonization.

[11] The statute requires only that the EPA abide by the time limitations requiring biennial publication. Nowhere does the statute require that the EPA synchronize its publication with the calendar year. OCE objects that use of the word "plan" implies that it be published before the described events take place. Although this argument has logical appeal, it is insufficient to trump the text of the statute.

[12] As long as the EPA meets the statutorily-prescribed deadlines, and affords opportunity for notice and comment, it has satisfied its mandatory duties under § 304(m). The publication schedule preferred by OCE is not mandated by the statute, and thus is not amenable to challenge under § 505(a)(2).

IV. IDENTIFICATION OF NEW POLLUTING SOURCES

OCE also argues that EPA has failed to identify new categories of industry discharging toxic and nonconventional pollutants not covered by existing effluent guidelines. The district court found that in 2005 EPA identified only two new sources for which no guidelines then existed. According to OCE, following EPA's 2003 review, EPA proposed not to schedule promulgation of any new effluent guidelines.

[13] Under § 304(m)(1)(B), the Administrator "shall" devise a plan which "shall—identify categories of sources discharging toxic or nonconventional pollutants for which guidelines

under subsection (b)(2) of this section and section 1316 of this title have not previously been published." The Administrator is also required to schedule publication of effluent guidelines for the categories identified under § 304 (m)(1)(B). *See* CWA § 304(m)(1)(C).

[14] The statute does not require that the Administrator identify *all* or *any* existing categories of sources, only that the Administrator identify currently unregulated categories. The Senate Committee Report on the 1985 Amendments states: "Guidelines are required for any category of sources discharging significant amounts of toxic pollutants. In this use, 'significant amounts' does not require the Administrator to make any determination of environmental harm; any non-trivial discharges from sources in a category must lead to effluent guidelines." S. Comm. on Env't & Pub. Works, 99th Cong., Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 25 (Comm. Print 1985). The Senate Committee Report suggests that it is at least within the discretion of the Administrator to determine whether particular discharges are non-trivial, and hence require new effluent guidelines.

[15] While the identification of new categories is a nondiscretionary duty, the precise number and kind of such categories identified is discretionary with the Administrator. The statutory language does not command otherwise. Since EPA did identify two new categories of sources during the period in question here, OCE's challenge to the sufficiency of

new source identification is not properly brought under § 505(a)(2).

V. MOTION TO TRANSFER

After filing a notice of appeal to this court, OCE filed a motion to transfer its claims to this court as if they were originally filed here under § 509(b)(1). The district court did not abuse its discretion in refusing to transfer claims to this court after the notice of appeal had been filed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (holding that once a notice of appeal is filed, the district court is divested of jurisdiction over the matter being appealed); *see also Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (a challenge to the district court's refusal to transfer claims under 28 U.S.C. § 1631 is reviewed for an abuse of discretion).

CONCLUSION

The district court properly dismissed OCE's claims regarding the manner and timing of review of the guidelines, the scheduling of plan publication and identification of new polluting sources, and did not abuse its discretion in refusing to transfer OCE's claims to this court.

AFFIRMED. Each party shall bear its own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OUR CHILDREN'S EARTH FOUNDATION, and ECOLOGICAL RIGHTS FOUNDATION; ECOLOGICAL RIGHTS FOUNDATION,
Plaintiffs-Appellants,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL O. LEAVITT, Administrator of EPA; STEVEN L. JOHNSON,
Defendants-Appellees,

ASSOCIATION OF METROPOLITAN OPINION SEWERAGE AGNENCIES; EFFLUENT GUIDELINES INDUSTRY COALITION; THE UTILITY WATER ACT GROUP (UWAG); NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES (NACWA),
Defendants-Intervenors-Appellees.

No. 05-16214

D.C. No. CV-04-02132-PJH

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted

February 13, 2007—San Francisco, California

Filed October 29, 2007

Before: J. Clifford Wallace, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown; Partial Concurrence and Partial Dissent by Judge Wallace

COUNSEL

Christopher Sproul, Environmental Advocates, San Francisco, California, for the appellant.

Sue Ellen Wooldridge, Assistant Attorney General, Washington, DC, for the appellees.

Fredric P. Andes, Carolyn S. Hesse, and David T. Ballard, Barnes & Thornburg, L.L.P., Chicago, Illinois, for intervenorappellee Effluent Guidelines Industry Coalition.

David W. Burchmore and Jill A. Grinham, Squire, Sanders, & Dempsey L.L.P., Cleveland, Ohio, for intervenorsappellees Association of Metropolitan Sewerage Agencies, now known as National Association of Clean Water Agencies.

Melanie Shepherdson, National Resources Defense Counsel, Washington, DC, amicus in support of the appellants.

Jeffrey Odefey, Waterkeeper Alliance, Tarrytown, New York, amicus in support of the appellants.

OPINION

McKEOWN, Circuit Judge:

In 1972 Congress passed the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act of 1972), Pub. L. No. 92-500, 86 Stat. 816 (1972), codified at 33 U.S.C. § 1251(a). Central to that legislation and later amendments is the notion that pollution discharges would be controlled through technology-based effluent limitations.

Environmental advocates, Our Children's Earth Foundation and Ecological Rights Foundation (collectively "OCE"), filed this citizen suit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, alleging that the Environmental Protection Agency ("EPA" or "the Agency") has failed to fulfill its mandate to review effluent guidelines and limitations in a timely manner and in accord with technology-based standards. Specifically, OCE claims that EPA violated its statutorily-mandated duties by abandoning *technology-based* review in favor of *hazardbased* review; neglecting to identify *new* polluting sources; and failing to publish timely plans for future reviews. *See* CWA § 301(b), 33 U.S.C. § 1311(b); CWA § 301(d), 33 U.S.C. § 1311(d); CWA § 304(b), 33 U.S.C. § 1314(b); CWA

§ 304(m), 33 U.S.C. § 1314(m).[1]

A technology-based approach to water quality focuses on the achievable level of pollutant reduction given current technology, whereas a hazard-based[2] approach seeks to identify known hazards or contaminants in the water and to reduce the prevalence of those hazards. *See, e.g.*, S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. 3668, 3674-78. Although these approaches are not mutually exclusive, OCE claims that EPA jettisoned a technology-based approach altogether, thus abdicating its statutory duties.

The district court granted judgment in favor of EPA, holding that the challenged acts or omissions were discretionary. We agree that the decision whether to revise the effluent guidelines falls within EPA's discretion. We do not agree, however, that in its periodic review of the guidelines, EPA has discretion to ignore the technology-based criteria. Consequently, we affirm in part, reverse in part, and remand for further proceedings.

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[1] Sections of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, are conventionally cited using the sections of the original Act, rather than the section numbers assigned after codification in the U.S. Code. We follow that convention here. The first time we cite to a provision of the Act, we include a preliminary parallel citation to the U.S. Code. All citations are to the CWA unless indicated otherwise.

[2] Hazard-based regulation is also referred to in the record as waterquality-based and harm-based regulation.

BACKGROUND

OCE's amended complaint contains four claims alleging non-compliance with what OCE characterizes as EPA's mandatory duties under the Act:

(1) EPA failed to review effluent guidelines based on the "best conventional pollutant technology" ("BCT") and "best available technology" ("BAT"), as mandated by § 304(b), (m);

(2) EPA failed to review existing effluent limitations as required by § 301(b), (d);

(3) EPA failed to issue timely final effluent guidelines plans as required by § 304(m)(1); and

(4) EPA failed to identify *new* polluting sources as required by § 304(m)(1)(B).

In sum, OCE argues that the CWA requires, as a nondiscretionary matter, that the Agency take a particular approach to water safety regulation: technology-based review, published in a sufficiently timely fashion to afford a meaningful opportunity for notice and comment. EPA and Intervenors Effluent Guidelines Industry Coalition and Association of Metropolitan Sewerage Agencies (now known as the National Association of Clean Water Agencies) (together, "Intervenors") counter that EPA's non-discretionary duties do not extend to a particular manner of performing reviews and revisions.

We first address the argument by EPA and

the Intervenors that this suit was not properly brought under the citizen suit provision of the Act, § 505(a), 33 U.S.C. § 1365(a)(2), but rather should have been brought under § 509(b)(1), 33 U.S.C. § 1369(b)(1). Then, we consider whether the district court has jurisdiction over each of OCE's four claims under § 505(a)(2). Because § 505(a)(2) jurisdiction is predicated on citizen enforcement of a non-discretionary duty, our analysis focuses on whether the claims relate to discretionary or nondiscretionary duties under the Act.

ANALYSIS

I. JURISDICTION TO REVIEW AGENCY ACTION[3]

[1] The CWA contains two separate jurisdictional sections: § 505(a), known as the citizen suit provision, and § 509(b)(1), which relates primarily to challenges to promulgation of certain standards and determinations. OCE brought suit under § 505(a)(2), which permits "any citizen [to] commence a civilaction on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under

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[3] The Agency's position on jurisdiction is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1038-39 (D.C. Cir. 2002) ("Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under *Chevron*.") (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

this chapter which is not discretionary with the Administrator."[4] CWA § 505(a)(2).

[2] Alternatively, § 509(b)(1) permits suits against the EPA Administrator for review of action

> (A) in promulgating any standard of performance under section 1316 of this title, (B) in making anydetermination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section1317 of this title, (D) in making any determinationas to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l). . . .

Suits brought pursuant to § 509(b)(1) must be filed directly

> in the Circuit Court of Appeals of the United States for the Federal judicial district in

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[4] OCE's amended complaint also cites the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, as an alternative basis for jurisdiction, but does not allege any claims under the APA.

> which [petitioner] resides or transacts business. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

CWA § 509(b)(1). Section 509(b)(1) actions, as opposed to suits brought under § 505(a)(2), challenge the exercise of the Administrator's discretion in promulgating standards and issuing determinations.

[3] So long as EPA's challenged acts and omissions relate to non-discretionary duties under the Act, OCE's action was properly brought in the district court under § 505(a)(2). To the extent OCE challenges actions within the discretion of the Administrator, the district court properly refused to exercise jurisdiction under § 505(a)(2). Nonetheless, a jurisdictional defect under § 505(a)(2) does not mean that jurisdiction is proper under § 509(b)(1).

"[T]his Court has counseled against expansive application of section [509(b)]." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002). Section 509(b)(1) covers only challenges to "promulgation" or "approval" or "determinations" on permits, not failure to comply with allegedly mandated procedures, which is the thrust of OCE's suit.

Additionally, § 509(b)(1) lists a number of sections for which review obtains in the court of

appeals: §§ 301, 1312, 304(*l*), 1316, 1317, 1342, and 1345. Neither §§ 304(b) or 304(m) are referenced in § 509(b)(1). Because the challenge here does not stem from the promulgation or approval of an effluent limitation or permit, we need not decide whether § 509(b) encompasses a challenge under § 304. *Compare E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) (suggesting that the EPA could collapse the limitations to be promulgated under §§ 301 and 304 into a single review), with *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1310 (9th Cir. 1992) (holding that the sections listed in § 509 are sufficiently specific that unlisted sections should not be interpreted to be covered by § 509).

[4] We thus agree with the district court that the circuit court's exclusive jurisdiction "extends only to a substantive review of the appropriateness of the guidelines actually promulgated, and not to the threshold question of whether the statutory requirements of the CWA have been met." No such promulgated guidelines or limitations are at issue here. The district court had jurisdiction under § 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA.

II. THE *CHEVRON* FRAMEWORK

In determining whether OCE's four claims challenge nondiscretionary obligations under the Act, our first point of reference is the statute itself. We must first address whether Congress resolved the contested issues in the statute. If so, "the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress." *See Chevron*, 467 U.S. at 842-43. *Chevron* deference is not due where the clear dictates of the statute counsel an interpretation different from the Agency's. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (9th Cir. 2005). We "must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

In the event that congressional intent cannot be determined or is ambiguous, the second step of the *Chevron* analysis considers whether the agency's interpretation of the statute is a reasonable one. *Id.* at 843. Even if an opposing construction of the statute is better supported by policy considerations, we do "not sit to judge the relative wisdom of competing statutory interpretations." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 134 (1985). As long as the agency's construction "is not inconsistent with the language, goals, or operation of the Act," the agency should prevail. *Id.* However, the agency "may not ignore factors Congress required be taken into account." *Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1131 (9th Cir. 2007).

Although the line between a congressional mandate and an area of agency discretion is not difficult to state, ascertaining that line is not always as easy. When Congress specifies an obligation and uses the word "shall," this denomination usually connotes a mandatory command. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). On the other

hand, "[a]bsent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion." *Farmers Union Cent. Exch. v. Thomas*, 881 F.2d 757, 761 (9th Cir. 1989).

However, not every decision is so easily categorized. As the Supreme Court teaches, the decision-making process does not necessarily collapse into a single final decision. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997). In *Bennett*, considering a citizen suit provision parallel to that in the CWA, the Supreme Court held, "[s]ince it is the omission of these *required* procedures that petitioners complain of, their . . . claim is reviewable." *Id.* at 172 (emphasis added).

With these general principles in mind, we consider the CWA provisions relevant to each of OCE's claims to determine whether the particular claim relates to a mandatory obligation or discretionary agency function under the Act.

III. TECHNOLOGY-BASED REVIEW AND REVISION

A. HISTORY OF THE CWA AND TECHNOLOGY

By way of brief overview, when the CWA was enacted in 1972, its stated goal was the elimination of all discharges of pollutants into the Nation's

waters by 1985. *See* CWA § 101(a)(1); 33 U.S.C. § 1251(a)(1). This goal was to be accomplished through ambitious technological improvements, because the previous water-quality based approach to pollutant control had been "limited in its success." S. Rep. No. 92- 414, at 8 (1971), 1972 U.S.C.C.A.N. at 3675. In the CWA's Declaration of Goals and Policy, Congress wrote, "it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans." CWA § 101(a)(6).

The CWA formally prohibits the "discharge of a pollutant" from any source into navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *See* CWA § 301(a). NPDES permits, issued either by the EPA, or by the states in a federally-approved permitting system, are statutorily required to set forth, at the very least, "effluent limitations"—that is, certain "restriction[s] . . . on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged . . . into navigable waters." *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 491 (2d Cir. 2005) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004)).

The specific effluent limitations contained in each NPDES permit are determined by the terms of more general "effluent limitation guidelines," which are separately promulgated by the EPA. The effluent limitations and the guidelines have long

been understood to be determined according to the best available or practicable technology. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 121 (explaining the technology-based character of effluent limitations and guidelines); *see also Waterkeeper Alliance*, 399 F.3d at 491 ("ELGs, [Effluent Limitation Guidelines] and the effluent limitations established in accordance with them, are technology-based restrictions on water pollution. They are technology-based, because they are established in accordance with various technological standards that the Act statutorily provides . . . .").

Since 1972 Congress has amended the CWA on a number of occasions. In the 1985 amendments, Congress reaffirmed its commitment to a technology-based approach to water quality regulation:

> The technology-based approach to water pollution control was adopted in 1972 because of the historical ineffectiveness of the previous water-quality-based approach. This approach failed because of uncertainties about the relationship between pollutant loadings and water quality and the association between water quality and health and environmental effects. There are still significant gaps in knowledge of these relationships. Consequently the reported bill reaffirms the technologically-based approach established in 1972 as an immediate and effective method of achieving the goals of the Act.

S. Comm. on Env't & Pub. Works, 99th Cong.,

Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 3- 4 (Comm. Print 1985).

B. THE STATUTORY FRAMEWORK

[5] Three key statutory provisions of the CWA are at issue here: §§ 301(d), 304(b) and 304(m). Section 301(d) requires EPA to review, every five years, the effluent limitations established under § 301(b)(2) and to revise such regulations "if appropriate." These processes are undergirded by a series of mandated criteria stating what the regulations "shall" contain. The mandated criteria include technology-based requirements. Sections 304(b) and (m) require an annual review of "guidelines for effluent limitations" applicable to direct dischargers and revision "if appropriate." As in § 301, § 304(b) includes mandated criteria that reference technology-based requirements, without differentiating between application of these criteria to promulgation, review or revision. Section 304(m) specifically provides for a schedule for review of the guidelines in accordance with § 304(b).

According to EPA, rather than conducting separate reviews, it consolidates effluent limitations required under § 301(d) into effluent limitation guidelines under § 304(b). As EPA puts it: "through its annual review of its consolidated 'effluent limitation guidelines' EPA also reviews the effluent limitations they contain, thus meeting its review requirements under § 301(d) and § 304(b) simultaneously."

C. CRITERIA FOR REVIEW AND REVISION

It is undisputed that EPA has an obligation to review effluent guidelines and limitations for possible revision, and that such a review is mandatory. It is also undisputed that EPA's ultimate decision *whether* to revise the guidelines and limitations is discretionary, as "appropriate." And, it is undisputed that any revision must be in accord with detailed statutor criteria that incorporate variants of the best-technology standard. What remains in dispute is whether, as part of its mandated *review* process, EPA must consider the technology based criteria. To address this question, we begin with the statute itself.

[6] The Act imposes on EPA non-discretionary duties to review its current effluent limitations guidelines regulating the pollutants discharged into the nation's waters, and, "where appropriate," to revise them, according to the criteria in the statute. *See* CWA §§ 301(d); 304(b), (m). Under § 304(b), "the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations." The statute goes on to provide that "[s]uch regulations shall" conform to specific criteria. The requirement of a technology-based approach to promulgation and revision of regulations runs throughout the statutory text of § 304(b).

Section 304(b)(1)(A) states:
Such regulations shall—identify . . . the

> degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources
> . . . .

CWA § 304(b)(1)(A).

Section 304(b)(1)(B) relates that the regulations "shall":

> specify factors to be taken into account . . . . relating to the assessment of best practicable control technology currently available . . . includ[ing] consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques . . . . and such other factors as the Administrator deems appropriate.[5]

CWA § 304(b)(1)(B).

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[5] This last phrase, "and such other factors as the Administrator deems appropriate," indicates, as OCE acknowledges, that the EPA could adopt additional factors for consideration, including harm or risk-based factors. The discretion to consider additional factors does not, however, render the mandatory factors optional.

Section 304(b)(2)(A) continues to mandate a technology based approach, without differentiating between promulgation and revision:

> regulations shall . . . identify, . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations . . . .

CWA § 304(b)(1)(A).

Section 304(b)(4)(A) yet again requires an analysis in terms of "application of the best conventional pollutant control technology . . . ." Each of the subsections of § 304(b) includes a mandatory requirement related to technology.

[7] Under § 304(m), EPA also has an obligation to publish a biennial plan announcing a schedule for performing the annual review and for establishing rules regarding any existing effluent guideline selected for possible revision as a consequence of the annual review. Section 304(m)(1) states in full:

> (m) Schedule for review of Guidelines
>
> (1) Publication
>
> Within 12 months after February
>
> 4, 1987, and biennially thereafter, the

> Administrator shall publish in the Federal Register a plan which shall—
> (A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section [specifying technology-based factors];
>
> (B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and
>
> (C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

CWA § 304(m)(1).

In § 301, which deals with the five year review and revision of effluent limitations, Congress wrote: "Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such

paragraph." CWA § 301(d). The cross-referenced subsection (b)(2) mandates the application of technology-based criteria in determining the applicable effluent limitations.

For example, § 301(b)(2)(A) states that effluent limitations for categories other than publicly-owned treatment works "shall require application of the best available technology economically achievable . . . ." The mandated technologybased criteria run throughout the text of § 301(b). *See, e.g.*, CWA § 301(b)(1)(A) ("[E]ffluent limitations . . . shall require the application of the best practicable control technology currently available . . . ."); § 301(b)(2)(E) ("[P]ollutants identified . . . shall require application of the best conventional pollutant control technology . . . .").

Under the first step of the *Chevron* analysis, the plain language of these provisions reflects that the CWA repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the regulations, at least as one methodology among others. Further, the statute makes clear that the regulations must comport with technological criteria that change over time, suggesting logically that review and revision must attend to such criteria as well in order for the regulations and limitations to remain in compliance with the mandatory and temporally changing criteria. The statutory language is unambiguous that *revision* decisions, although discretionary as indicated by the "if appropriate" language, are constrained by the statute's mandate as to what

"such regulations" "shall" accomplish. The statute states that the regulations "shall" account for the technological factors without distinguishing between promulgation and revision.

[8] While the overall structure of the Act strongly counsels that any *review* to determine whether revision is appropriate must contemplate the mandatory technology-based factors, the statute does not expressly and unequivocally state as much. Therefore, we move to the second step of the *Chevron* analysis to consider whether EPA's position that the review need not abide by the same factors governing revision and promulgation is reasonable. Our review of the statute, its purpose, and its logical construction lead us to conclude that to the extent EPA argues that it may totally ignore technology as part of its annual review, EPA's position is unreasonable. To adopt EPA's position would require us to "ignore factors Congress required to be taken into account." *Earth Island*, 484 F.3d at 1131.

Although the dissent questions the invocation of the *Chevron* framework, we note that this approach gives the EPA the benefit of any ambiguity or doubt in analyzing these inter-locking statutory provisions. Our charge, in any event, is to interpret the statute and determine whether there is a mandatory duty. As explained below, under traditional principles of statutory construction, the result is the same.

The statute all but explicitly states that the

review is governed by the revision standards. Section 304(1)(A)—pertaining to the schedule for the annual *review* of the guidelines—cross-references § 304(b), which extensively delineates the *technology-based criteria*. Under § 304(m)(1)(A) the Administrator "shall" "establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section." Since § 304(m) itself references the timing of the reviews, the cross-reference to § 304(b) cannot relate solely to timing, unless the cross-reference is mere surplusage. Similarly, § 301(d), pertaining to review and revision of effluent limitations, cross-references § 301(b)(2), which in turn mandates various technological considerations. The rule against surplusage requires that we not regard Congressional acts as meaningless and the amendment of acts as "mere surplusage." *Natural Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 325 (2d Cir. 1976); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1978) (stating that "[in] construing a statute we are obliged to give effect, if possible, to every word Congress used"). The only reasonable interpretation of the cross referenced provisions is that they tie the review and revision to § 304(b) and § 301(b), respectively, both of which mandate a technology-based approach.

We next look at the common sense reading of the statute. The clear purpose of review and revision is to provide for continuing regulatory compliance with the statutorily mandated and temporally changing criteria reflecting what the regulations and limitations "shall' accomplish. If the regulations

and any revision must incorporate technology-based factors, how could EPA conduct a review to assess continuing compliance with the statutorily-mandated technology-based requirements, while ignoring technology considerations altogether? For review to meaningfully determine whether revision is appropriate, such review must attend to the statutorilymandated technology factors that provide for what the regulations are to accomplish. It makes no sense that Congress would require promulgation and revision tethered to technology-based requirements, but would somehow silently render discretionary the choice as to whether to review in light of the statutorily-required technological criteria. If the review is not also technology-based, the review could hardly inform the discretionary decision of whether revision is in fact appropriate, thus ignoring Congress' mandate as to what the regulations and limitations "shall" accomplish. To be sure, the ultimate decisions in the review process are discretionary "as appropriate," but the foundational standard for review—the technology approach—is not optional.

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court highlighted the important distinction between a mandatory review process and an ultimately discretionary decision to take action following the review. 502 U.S. at 172. The Court considered a claim brought under the citizen suit provision of the Endangered Species Act (ESA), which, similar to CWA § 505(a), authorizes suits against the Secretary of Commerce or of the Interior "where there is alleged a failure of the

Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). Petitioners alleged that the Secretary failed to abide by the statutory mandate to "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 520 U.S. at 172. The mandatory criteria to be considered by the Secretary under the ESA are followed by the statement that, except where the extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quotation marks and citation omitted).

In *Bennett*, as here, the agency argued that judicial review was not available because the Secretary had "not failed to perform any nondiscretionary duty." in light of the discretionary nature of the ultimate decision at issue. *See* 520 U.S. at 171. Rejecting that analysis, the Supreme Court concluded that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.' " 520 U.S. at 172 (citation omitted).

The challenge here mirrors that in *Bennet v. Spear*, in that OCE alleges a failure by EPA to consider particular statutorily-prescribed factors in

making discretionary determinations. As the Court made plain in *Bennett*, "discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.*

Significantly, our reading of the statute comports with EPA's own earlier interpretation of its review obligations. EPA stated in its 2003 Notice in the Federal Register that "[b]ecause CWA § 304(m)(1)(A) requires EPA to review promulgated guidelines in accordance with CWA section 304(b), EPA interprets the statute to authorize EPA to employ the same factors for its annual review that it would consider in selecting BAT in a rulemaking context. EPA believes that this is a reasonable approach because the outcome of EPA's annual review is a decision . . . identifying those effluent guidelines for possible revision." *See* Preliminary Effluent Guidelines Plan for 2004-2005, 68 Fed. Reg. 250, 75515 (EPA Dec. 31, 2003). Now, EPA disavows that § 304(m) links review procedures to revision and promulgation procedures. This inconsistency in EPA's position entitles its current interpretation to less deference. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) ("Given this fluctuation . . . we decline to rely on the Forest Service's 'expertise.' ").

[9] Finally, the legislative history supports reading thecreview provisions as mandating consideration of technology. In adopting the legislation, the Senate Committee on Public Works Conference Report recognized that the

preexisting harm-based or water-quality approach was "limited in its success." S. Rep. No. 92-414, at 8 (1971), 1972 U.S.C.C.A.N. at 3675.

> Officials are still working to establish relationships between pollutants and water uses. . . . The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable . . . limitations on the basis of a given stream quality . . . . The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality . . . . In order to carry out . . . this legislation, a two phase program . . . is created: the first based on best practicable technology, the second based on best available technology. In Phase I . . . all industrial pollution sources must apply the best practicable technology . . . . In Phase II . . . communities and industries will be required to apply, where the goal of no-discharge cannot be attained, the best available technology.

Id.

[10] The Committee report states that Congress intended the CWA to adopt a technology-based approach, not just with the initial regulations,

but *over time* in multiple phases as technology continuously improved. Although we have not previously considered the particular question of EPA's review, in *Crown Simpson Pulp Co. v. Costle*, 642 F.2d 323, 327 (9th Cir. 1981), we acknowledged the technology-based requirements of the CWA: "We need not repeat here the exhaustive discussions of the legislative history of the Act. . . . These discussions demonstrate that a fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent." If EPA dispenses with technology-based considerations altogether in deciding whether to revise the effluent limitations and guidelines, it will be unable to fulfill Congress' mandate to tie effluent regulation to technological improvements.

Despite the structure of the statute, EPA's earlier statement that its reviews under § 304 are governed by the revision criteria, and the Act's legislative history, EPA and the Intervenors argue that the technology-based approach provided for in § 304(b) applied only to the *initial* promulgation of regulations in 1972 and not to any subsequent review of those regulations or limitations. EPA seizes on the language at the beginning of § 304(b)—"the Administrator shall . . . publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations"—and claims that the mandatory language modifies only the promulgation provision, not ongoing review for

possible revision. Since the mandate about what the regulations "shall" achieve does not distinguish between promulgation, review and revision, the plain language of the statute does not support EPA's position. This argument is not only strained, but it makes no sense. In short, this position is unreasonable.

As we noted earlier, many of the particular technological criteria the regulations and limitations "shall" incorporate under § 301(b) and § 304(b) are temporally changing rather than fixed in time. For instance, the statute mandates that the regulations "shall" "identify" "the degree of effluent reduction attainable through the application of the best practicable control technology currently available" and "the degree of effluent reduction attainable through the application of the best control measure and practices achievable including treatment techniques" and "process and procedure innovations." CWA § 304(b)(1)(A)-(4)(B). How can the regulations continue over time to identify the level of effluent reduction attainable through the best technology and procedure innovations currently available if EPA's review does not consider post-1972 technological advances at all? It strains credulity to the breaking point that Congress would provide in such great detail relevant temporally changing technological factors, and would then permit EPA to adopt regulations and limitations that would freeze in time the technology available in 1972 or even in the 1980s.

Finally, in support of its position that a

technology-based approach is discretionary, EPA also points to *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65-72 (2004), which held that a citizen suit under the APA cannot "seek wholesale improvement" of an agency "program by court decree." *Id.* at 64. We first note that OCE does not seek to "improve" EPA's review but simply to ensure compliance with objective criteria. The claim in *Norton* is also distinguishable from our case in a number of other respects. First, the statutory language in *Norton* was cast in discretionary and far broader terms than the language in the CWA. Whereas *Norton* concerned whether the Bureau of Land Management was managing wilderness areas in a manner "suitable" for preservation, OCE challenges the omission of specific statutorily prescribed factors in EPA's reviews. Notably, in *Norton*, plaintiffs cited, in part, a *plan* rather than the statute itself as a source of the duty in question. Finally, the language in the plan took the form of "will" rather than "shall," which the Supreme Court found to lack the force of a binding commitment. *Id.* at 69. Here, as in *Bennett*, the statute mandates certain criteria that are to inform discretionary determinations as to the precise form of the regulations and effluent limitations. The overlying discretion does not render the mandated criteria discretionary.

[11] To the extent the EPA has completely abandoned a technology-based review in favor of a hazard-based review, the Agency has breached its mandatory duties under §§ 301(d) and 304(b), (m). Although the EPA may determine in its exercise of

discretion that no revision is appropriate, in conducting its review to reach that decision, the Agency must attend to the technology-based factors specifically prescribed by the CWA.

[12] Because the district court determined that EPA had no mandatory duty with respect to review requirements, the court did not consider whether EPA breached that duty. At this stage of the proceedings and on this record, however, it is not clear whether the EPA has in fact abandoned the mandatorytechnology-based approach altogether. While OCE claims that EPA has abandoned this duty, EPA counters that in fact it adopted a technology-based approach in addition to a harmbased approach.[6] Because this central dispute is unresolved, we remand to the district court for further proceedings.

IV. PUBLICATION SCHEDULE PROPOSED BY OCE

[13] Section 304(m) requires biennial publication of a plan for scheduling annual review and revision of the guidelines. The plan must

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[6] For example, OCE claims that EPA has abandoned a technology-based review, citing EPA's own description of its annual review, which states, "EPA did not . . . conduct a comprehensive screening-level review of the availability of treatment or process technologies." EPA now disputes this characterization, claiming in its brief that "[i]n addition to conducting a hazard-based review, EPA also directly reviewed the availability of pollutant-reducing technologies for various industrial categories."

provide for public review and comment prior to final publication. *See* CWA § 304(m)(2). OCE argues that the plan should be synchronized with the annual review, but as the district court correctly held, the Act does not require this degree of harmonization.

[14] The statute requires only that the EPA abide by the time limitations requiring biennial publication. Nowhere does the statute require that the EPA synchronize its publication with the calendar year. OCE objects that use of the word "plan" implies that it be published before the described events take place. Although this argument has logical appeal, it is insufficient to trump the text of the statute, and the deference owed to the EPA under *Chevron*.

[15] As long as the EPA meets the statutorily-prescribed deadlines, and affords opportunity for notice and comment, it has satisfied its mandatory duties under § 304(m). The publication schedule preferred by OCE is not mandated by the statute, and thus is not amenable to challenge under § 505(a)(2).

V. IDENTIFICATION OF NEW POLLUTING SOURCES

OCE also argues that EPA has failed to identify new categories of industry discharging toxic and nonconventional pollutants not covered by existing effluent guidelines. The district court found that in 2005 EPA identified only two new sources for which no guidelines then existed. According to

OCE, following EPA's 2003 review, EPA proposed not to schedule promulgation of any new effluent guidelines.

[16] Under § 304(m)(1)(B), the Administrator "shall" devise a plan which "shall—identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published." *Id.* The Administrator is also required to schedule publication of effluent guidelines for the categories identified under § 304(m)(1)(B). *See* CWA § 304(m)(1)(C).

[17] The statute does not require that the Administrator identify *all* or *any* existing categories of sources, only that the Administrator identify currently unregulated categories. The Senate Committee Report on the 1985 Amendments states: "Guidelines are required for any category of sources discharging significant amounts of toxic pollutants. In this use, 'significant amounts' does not require the Administrator to make any determination of environmental harm; any non-trivial discharges from sources in a category must lead to effluent guidelines." S. Comm. on Env't & Pub. Works, 99th Cong., Report to Accompany S. 1128 (1985 Clean Water Act Amendments) 25 (Comm. Print 1985). The Senate Committee Report suggests that it is at least within the discretion of the Administrator to determine whether particular discharges are non-trivial, and hence require new effluent guidelines.

[18] Applying *Chevron* deference, we hold that the identification of new categories is a non-discretionary duty, but that the precise number and kind of such categories identified is discretionary with the Administrator. The statutory language and the legislative history do not command otherwise. Since EPA did identify two new categories of sources during the period in question here, OCE's challenge to the sufficiency of new source identification is not properly brought under § 505(a)(2).

VI. MOTION TO TRANSFER

After filing a notice of appeal to this court, OCE filed a motion to transfer its claims to this court as if they were originally filed here under § 509(b)(1). The district court did not abuse its discretion in refusing to transfer claims to this court after the notice of appeal had been filed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (holding that once a notice of appeal is filed, the district court is divested of jurisdiction over the matter being appealed); *see also Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (a challenge to the district court's refusal to transfer claims under 28 U.S.C. § 1631 is reviewed for an abuse of discretion).

CONCLUSION

On remand, the district court has jurisdiction to consider whether EPA is undertaking the mandated technology-based review provided for under the Act. The district court properly

dismissed OCE's claims regarding the scheduling of plan publication and identification of new polluting sources, and did not abuse its discretion in refusing to transfer OCE's claims to this court. The case is remanded for further proceedings to determine whether EPA has in fact breached its nondiscretionary duties under §§ 301 and 304.

REVERSED and **REMANDED** for further proceedings as to the claims challenging EPA's alleged abandonment of a technology-based approach; **AFFIRMED** as to the plan publication claim, new sources claim, and refusal to transfer under 28 U.S.C. § 1631. Each party shall bear its own costs on appeal.

WALLACE, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the CWA does not unambiguously state that the EPA must conduct a technology-based review of its effluent guidelines. Because the CWA does not clearly mandate a particular method of review, I would hold that the district court properly refused to exercise jurisdiction.

Environmental advocates OCE brought suit under sectionc505(a)(2) of the CWA. This section provides jurisdiction in the district court for any claims alleging "a failure of the Administrator to perform any act or duty under this chapter which is

not discretionary with the Administrator." CWA § 505(a)(2). We have recognized that only "clear-cut" nondiscretionary duties give rise to jurisdiction under this section. *See Farmers Union Cent. Exch., Inc.*, 881 F.2d 757, 760 (9th Cir. 1989). We have further emphasized that section 505(a)(2) was "intended to provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function," and was not intended to "permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1356 (9th Cir. 1978) (quoting *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313, 321 (W.D. Wis. 1975).

I am not convinced that *Chevron* analysis is appropriate for this case. We are not trying to determine whether we should defer to the EPA's interpretation of the statute. We are merely trying to determine whether, objectively, the statute creates a mandatory duty, and whether plaintiffs could therefore challenge the EPA's failure to perform that duty in the district court. In other words, it is not a question of whether the *EPA* thinks the statute is mandatory, it is a question of whether we do. With the *Chevron* confusion eliminated, this becomes a relatively straightforward case.

It is undisputed that under the CWA, the EPA has an obligation to review periodically its effluent guidelines and limitations. It is further undisputed

that the EPA has an obligation to utilize technology-based criteria when it exercises its discretion to *revise* the guidelines and limitations. Nothing in the CWA, however, specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach. At most, the statutory provisions and legislative history are ambiguous. Because the CWA does not create a clear-cut, mandatory duty on the part of the EPA, I would affirm the district court's determination that it lacked jurisdiction under 505(a)(2).

I join the majority in holding that the district court properly dismissed OCE's remaining claims. I also join in holding that the district court did not abuse its discretion in refusing to transfer OCE's claims to this court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN'S EARTH FOUNDATION, et al.,
Plaintiffs,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants.

No. C 04-2132 PJH

ORDER

The U.S. Environmental Protection Agency ("EPA")'s motion for judgment on the pleadings and the parties' various motions for summary judgment came on for hearing on May 11, 2005 before this court. Plaintiffs Our Children's Earth Foundation and Ecological Rights Foundation appeared through their counsel Christopher Sproul and Michael Graf. Defendant EPA appeared through its counsel Eileen McDonough and Pooja Parikh. Intervenor Association of Metropolitan Sewerage Agencies ("AMSA") appeared through its counsel David Burchmore, and intervenor Effluent Guidelines Industry Coalition ("EGIC") appeared through its counsel Fredric Andes.

Having read the papers, including the brief of amicus curiae Waterkeeper Alliance, Inc., and carefully considered the relevant legal authority, the court GRANTS IN PART and DENIES IN PART

EPA's motion for judgment on the pleadings, DENIES plaintiffs' motion for summary judgment, and GRANTS defendants' and intervenors' motions for summary judgment, for the reasons that follow.[1]

BACKGROUND

This is an action brought under the Clean Water Act ("CWA"), 33 U.S.C. § 1251(a) et seq., and the Administrative Procedures Act ("APA"), 5 U.S.C. § 704. Plaintiffs assert that the EPA has failed to comply with provisions of the CWA and the APA concerning its regulation of effluent emissions (the discharge of pollutants into water).

The CWA requires the EPA to review its effluent guidelines annually, and to revise them "if appropriate." 33 U.S.C. § 1314(b). The CWA also mandates that the EPA publish a plan every two years that announces its schedule for performing this annual review and the schedule for rulemaking concerning any guidelines that are to be revised. 33 U.S.C. § 1314(m)(1)(A). This biennial plan must also identify categories of sources that discharge toxic or other non-conventional pollutants for which no guidelines currently exist, and provide a schedule for guidelines to be issued for those sources, with final action required within three years. 33 U.S.C. § 1314(m)(1)(B).

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[1] Pursuant to Civ. L.R. 7-13, this order may not be cited except as provided by Civ. L. R. 3-4(e).

Finally, the CWA requires the EPA to conduct a review every five years of the current effluent limitations and to ensure that they reflect appropriate levels of pollution based on the best available technology economically achievable and the best conventional pollutant control technology. 33 U.S.C. § 1311(d). If they do not, the EPA must revise the effluent limitations in accordance with the guidelines set forth at 33 U.S.C. § 1311(b)(2).

In September 2004, the EPA published the results of its 2004 review of the effluent guidelines and limitations, along with a schedule for the 2005 review and proposed changes to the effluent limitation guidelines. Graf Decl. Exh. 1 ("2004 EGP," at 69 Fed. Reg. 53705 (Sept. 2, 2004)). These reviews combine the effluent limitations imposed along with the guidelines suggested, and are known as "effluent limitations guidelines," which are promulgated in the effluent guidelines plan. The EPA also included revisions to two guidelines, added two new categories for which guidelines may be promulgated, and proposed a rulemaking schedule for the promulgation of guidelines for the new categories.

Plaintiffs filed suit, claiming: 1) that the EPA has failed to perform its mandatory duty to conduct an annual review of all effluent guideline limitations; 2) that the EPA has failed to conduct its five-year review of the effluent limitations in relation to the best available technology for reducing pollution; 3) that the EPA has failed to issue timely final effluent guideline plans; and 4) that the EPA

has failed to publish a proper final biennial plan.

Specifically, plaintiffs claim that the 2004 EGP sets forth a plan that identifies those industries with the highest risk of water pollution in the categories that are already established, and provides effluent guidelines only for those categories. Plaintiffs claim that the 2004 EGP does not identify other sources of water pollution among existing categories or identify new industries that are not yet regulated, and also fails to set national standards for any industry determined to be a "subcategory" of an already-regulated industry. Finally, plaintiffs claim that the 2004 EGP does not set a schedule for completing effluent guidelines for new industries, and has instead only set a schedule for commencing guideline promulgation.

On August 11, 2004, the court granted summary judgment in favor of the EPA on the third cause of action, finding that the EPA timely issued its biennial plan and was not required to issue that plan in conjunction with the calendar year or the annual report. The EPA brings a motion for judgment on the pleadings, and in addition, all parties have filed cross-motions for summary judgment on the remaining causes of action.

DISCUSSION

As discussed at the hearing, the procedures by which these motions were filed was somewhat disorganized, with parties responding to arguments

raised in the 12(c) motion in their summary judgment motions, and parties filing numerous motions and cross-motions in subsequent responsive briefs. To streamline matters, this order is organized instead by the legal issues raised as outlined by the court at the hearing.

A. Legal Standards

Judgment on the pleadings under Fed. R. Civ. P. 12(c) is appropriate after an answer has been filed and the complaint fails to state a cause of action upon which relief can be granted. *See, e.g., Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 753 (9th Cir. 1997). Summary judgment is appropriate when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. Jurisdiction

1. Mootness

The EPA argues that this dispute is moot because it has already issued the 2004 EGP. The cyclical nature of the EPA's obligations under the CWA, however, render them "capable of repetition, yet evading review." This exception to the mootness doctrine applies when "1) the duration of the challenged action is too short to allow full litigation before it ceases; and 2) there is a reasonable expectation that the plaintiffs will be subject to it

again." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173-74 (9th Cir. 2002) (Dept. of Interior's failure to comply with requirements to list endangered species on annual listings). Here, the short duration of time permitted for the EPA's annual and biennial reports, coupled with the EPA's ongoing obligation to review and revise regulations and issue reports, warrants the application of this exception to the mootness doctrine.

2. Ripeness

The EPA argues that the dispute is not ripe for review under the APA, because the 2004 effluent guidelines review and plan cannot be considered "final agency action" as required by the APA and *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004).

At the hearing, the parties' arguments whether plaintiffs had in fact asserted an APA claim in this action were unclear. Plaintiffs claimed that they were primarily proceeding under the CWA claims, but in the alternative, if the court did not find jurisdiction under the CWA to review the EPA's non-discretionary actions, the court could also proceed under the APA. However, the court here finds that it has jurisdiction to review the EPA's non-discretionary actions, and furthermore, notes that the amended complaint in this action does not in fact allege any claims under the APA. The court thus declines to reach any questions concerning the applicability of the APA in this case.

3. Standing

EGIC challenges plaintiffs' standing to proceed in this lawsuit. For the organizational plaintiffs here to show standing, each organization must show that 1) its members would otherwise have standing to sue in their own right; 2) the interests in the lawsuit are germane to its mission; and 3) neither the claim nor the relief requires the participation of individual members themselves. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (citations omitted). For the organizations' members to show standing, they must show 1) that they have suffered an injury in fact, 2) that there is a causal connection between the injury and the conduct at issue, and 3) that it is likely that the injury will be redressed by a verdict in their favor in this lawsuit. *Friends of the Earth, Inc. v. Laidlaw Environmental Serv.*, 528 U.S. 167, 180-81 (2000).

Plaintiffs are correct that they are alleging "procedural injury" based on the EPA's alleged failure to promulgate an EGP that complies with the CWA. To show standing to assert a procedural injury, plaintiffs must demonstrate that "the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 8 (1992).

Plaintiffs provide declarations from their members that show that many of them enjoy engaging in water-related activities, and their

enjoyment has been hampered by pollution from industries that should have been regulated by the EPA. Other members are hampered in their ability to teach their children about marine life, are hampered in their enjoyment of the coastline and coastal marine life, and are unable to eat seafood because of the EPA's actions. *See generally* Evenson Decl., Harty Decl., Parrott Decl.

EGIC claims that these allegations do not set forth interests sufficiently concrete to warrant a finding that the plaintiffs' members have suffered an injury in fact. However, plaintiffs' members can demonstrate the existence of an injury in fact by showing that they have "an aesthetic or recreational interest in a particular place . . . and that that interest is impaired by a defendant's conduct." *Ecological Rights Foundation*, 230 F.3d at 1147 (citations omitted). Here, plaintiffs' members have provided specific facts showing their aesthetic and recreational interest in clean water and clean water habitats. *See, e.g.*, Evenson Decl. ¶ 3 (member of plaintiff organization Environmental Rights Foundation); Harty Decl. ¶¶ 3-7, 13, 17, 18 (member of plaintiff organization Our Children's Earth Foundation); Parrott Decl. ¶¶ 2-5, 15, 16, 18, 19 (member of Our Children's Earth). This is sufficient to demonstrate an injury in fact for both plaintiffs. *Id.* (finding standing for individual members who use the affected areas and would find the aesthetic and recreational value of those areas impaired by defendants' actions), *citing Laidlaw*, 528 U.S. at 181-82; *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) ("To allege a legally

protected, concrete aesthetic interest, a plaintiff must show merely that the challenged action affects his aesthetic or ecological surroundings").

Similarly, because plaintiffs have properly produced evidence supporting their claims of aesthetic injury, they have shown the necessary causal link between their injuries and the EPA's procedural actions. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n. 7. Therefore, plaintiffs' members have standing to proceed on this claim, even if changing the procedural rules might not directly affect pollution levels in the waterways they use and enjoy. *Cantrell*, 241 F.3d at 682.

Thus, because plaintiffs' members have adequately demonstrated standing, and because EGIC does not dispute that this litigation is important to the organizational plaintiffs' mission or that individual plaintiffs are not needed to participate in this action, the organizations have standing to proceed in this case.

C. Appellate Court Jurisdiction

Next, the EPA argues that this court does not have jurisdiction over this dispute under the CWA. This case arises under a claimed violation of 33 U.S.C. § 1314 and 1311. The CWA vests exclusive jurisdiction over any claim arising under §§ 1311, 1312, 1315, and 1345 in the appellate courts. 33

U.S.C. § 1369(b)(1)(E). *See, e.g., Environmental Protection Information Ctr. v. Pacific Lumber Co.*, 266 F.Supp.2d 1101, 1109 (N.D. Cal. 2003) (explaining regulatory structure of CWA). The appellate court, however, cautions that its jurisdiction under § 509 should be interpreted narrowly. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n. 8 (9th Cir. 2002).

Plaintiffs argue that the Ninth Circuit has ruled that its original jurisdiction is limited only to the CWA sections specifically listed in § 1369, of which § 1314 is not. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1310 (9th Cir. 1992). However, for claims arising under § 1314, even though that section is not specifically listed in § 1369, jurisdiction vests in the appellate courts as well, due to the intertwined nature of sections 1311 and 1314. *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 127-128, 137 (1977) (approving of EPA's combined effluent guideline limitations reports, and finding that because § 1311 was drafted specifically to be enacted through regulations set forth in § 1314, the exclusive remedy for violations of § 1314 is before the appellate courts as well; it would be "truly perverse" to give the appellate courts power to review specific permit applications without also giving them the "power of direct review of the basic regulations governing those individual actions."). *See also Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 511-524 (2d Cir. 2005) (appellate court conducting review of effluent guideline limitations under § 1314 in the first instance); P.L. 95-217 § 73

91 Stat. 1609 (legislative history of CWA § 1314, indicating that appellate courts were to review EPA's compliance with the administrative requirements of the effluent guidelines and limitation requirements). *Cf. Longview Fibre*, 980 F.2d at 1310 (finding that § 1369 did not cover 33 U.S.C. § 1313, a separate section of the statute, which is not at issue here).

The appellate court's jurisdiction, though, extends only to a substantive review of the appropriateness of the guidelines actually promulgated, and not to the threshold question of whether the statutory requirements of the CWA have been met. Under the CWA, while the appellate court has jurisdiction over the substance of the decisions made, the district court continues to determine whether the agency has discharged its non-discretionary duties under the statute. 33 U.S.C. § 1365(a)(2) (gives citizens right to file suit "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator"); *see also Alaska Center for the Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994).

Therefore, to the extent that plaintiffs seek a ruling on the question whether the EPA has complied with its non-discretionary duties under the CWA, those questions are properly before this court. However, pursuant to section 1369 and Du Pont, this court is unable to reach any questions that plaintiffs raise concerning the substance of the regulations that the EPA has issued. The court thus GRANTS

IN PART and DENIES IN PART the motion for judgment on the pleadings, and limits its review solely to the question of whether the EPA discharged its mandatory duties under the CWA. Plaintiffs will not be permitted to bootstrap a review of the substantive elements of the EPA's decision in violation of 33 U.S.C. § 1365(a)(2) and § 1369(b)(1)(E).

D. Mandatory Duties

With questions about the scope of the court's jurisdiction now resolved, the court turns to the central question at issue in this case – whether the EPA properly discharged its duty under the CWA in promulgating the 2004 EGP.

Under the CWA, the EPA is required to 1) "revise, if appropriate" the effluent limitations guidelines currently in place at least once a year, 33 U.S.C. § 1314(b); 2) publish every two years a plan that establishs a schedule for the annual reviews, identify categories of sources for which no guidelines currently exist, and establish a schedule for the promulgation of new guidelines for those new categories of sources, 33 U.S.C. § 1314(m); and 3) review at least every five years the limitations promulgated under § 1314(b) and "if appropriate," revise them pursuant to standard procedures in subsection(b), 33 U.S.C. § 1311(d).

The 2004 EGP is intended to serve as the annual review under § 1314(b), the biennial plan under § 1314(m), and the five-year review

under § 1311(d) as well. 69 Fed. Reg. at 53705, 53707. The parties agree that the 2004 EGP moves away from the technology-based plans previously promulgated under a prior consent decree and this year, is based instead on a risk/hazard assessment methodology. This year, the EPA performed a first-level screening of all the previous effluent guideline categories, selected the categories it determined posed the most significant risk for water pollution, and promulgated guidelines only in those selected categories. *See, e.g.*, 69 Fed. Reg. at 53710-12. The EPA also identified only two categories for which no guidelines currently existed, and two categories for which the guidelines might be modified. The EPA did not examine any other categories. The EPA also admits that it did not conduct a technology review of the 450 categories and subcategories at issue. Plaintiffs argue that the EPA has, accordingly, failed to discharge the EPA's mandatory duties under the CWA.

The EPA is correct, however, that under § 1314(b) and § 1311(d), they need only review the guidelines previously promulgated, and revise them only if revisions are deemed "appropriate." This language thus grants broad discretion to the EPA to determine how it wishes to conduct the annual review. *See, e.g., Norton*, 124 S. Ct. 2373, 2380 (2004) (statute can require agency to act but when act is left to agency's discretion, the court cannot specify what particular type of action must be taken). Furthermore, in doing so, the EPA is not constrained by the factors listed in § 1314(b)(2). The plain language of the statute indicates that the

factors applied only to the regulations to be promulgated back in 1972, and not to the review or revisions subsequently made. Similarly, the EPA need only conduct a "review" of the effluent limitations every five years, and need only comply with the standards set forth in § 1311(b) if revision is found to be appropriate.

The plain language of § 1314(m) also makes clear that the EPA is not required to perform a technological review for all 450 categories and subcategories of effluent guideline limitations in the biennial report. The statute only requires that the EPA establish a schedule for the annual review, that new categories be identified, and that a schedule for promulgating rules for the newly-identified categories be proposed.

EPA has met all the requirements for the annual guideline review, biennial report, and five-year limitations review. Therefore, the EPA's mandatory duties under § 1314(m) have been fully discharged.

At the hearing, it became evident that plaintiffs recognize that the EPA has complied at some basic level with these requirements, and they object to the method by which the EPA did so, arguing that it is contrary to the purpose of the CWA to replace a technology-based review with a hazard-based review, and that the rules promulgated have the effect of exempting certain categories of water pollution entirely from review. Those questions, would be answered by a substantive review of the

2004 EGP, which this court has no jurisdiction to conduct.

E. Conclusion

Summary judgment on the question of whether the EPA has discharged its mandatory duties under the CWA is GRANTED in favor of the EPA and intervenors, and DENIED as to plaintiffs. The motion for judgment on the pleadings is GRANTED IN PART and DENIED IN PART, in that the court finds that its jurisdiction is limited to a review of the discharge of the EPA's statutory duties and does not reach questions that would amount to a substantive review of the 2004 EGP.

This order fully adjudicates the matters listed at nos. 63, 74, 87, 104, 105, and 113 on the clerk's docket, and all other pending matters for this case. The clerk is ordered to close the file.

IT IS SO ORDERED.

Dated: May 20, 2005

PHYLLIS J. HAMILTON
United States District Judge

STATUTORY PROVISIONS

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

Clean Water Act

Section 505(a)(2) [33 U.S.C. § 1365(a)(2)]

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

***

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Section 304(b) [33 U.S.C. § 1314(b)]

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator

shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)

(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and

such other factors as the Administrator deems appropriate;

(2)

(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point

sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)

(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and (B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311 (b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects

of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

Section 304(m) [33 U.S.C. § 1314(m)]

(m) Schedule for review of guidelines

(1) Publication

Within 12 months after February 4, 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall—

(A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section;

(B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 1316 of this title have not previously been published; and

(C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after February 4, 1987, for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

(2) Public review
The Administrator shall provide for public review and comment on the plan prior to final publication.

Section 301(b)(2)(A)(i), (C), (D), and (F)
[33 U.S.C. § 1311(b)(2)(A)(i), (C), (D), and (F)]

In order to carry out the objective of this chapter there shall be achieved—

***

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314 (b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as

determined in accordance with regulations issued by the Administrator pursuant to section 1314 (b)(2) of this title.

***

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314 (b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314 (b) of this title, and in no case later than March 31, 1989;

***

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this

paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

Section 301(d) [33 U.S.C. § 1311(d)]

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

EPA
United States Environmental Protection Agency

Factor 2 Analysis: Technology Advances and Process Changes Status of Screening Level Review Phase

U.S. Environmental Protection Agency
Engineering and Analysis Division
Office of Water
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

REVISED DRAFT
30 December 2003

Executive Summary

***

During the current planning cycle, EPA plans to evaluate all of these tools to determine whether they are appropriate for use in this or future planning cycles.

The initial screening of industrial categories relied primarily on information gathered under Factor 1: Human Health and the Environment (addressing discharge amounts, toxicity and effects) and Factor 4: Efficiency and Implementation (addressing efficiency of the guidelines and NPDES permitting programs, multi-media issues, etc.).

Using these two factors EPA identified twenty industrial categories for additional data collection. EPA also set its priorities for additional analyses supporting the final Effluent Guidelines Program Plan for 2004/2005. Specifically, EPA intends to complete a detailed review of the following industries to support the final Effluent Guidelines Program Plan for 2004/2005: Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF); and Petroleum Refining. After considering all available data, EPA may decide to identify one or both of these industries in the final Effluent Guidelines Program Plan for 2004/2005 for effluent guidelines revisions. To the extent possible in the limited time remaining in this planning cycle, EPA will continue to address data gaps and uncertainties affecting EPA's estimates of the potential risks and hazards posed by the remaining industries.

EPA found that gathering the data needed to perform a meaningful screening-level analysis for Factor 2 was much more resource-intensive than anticipated. Data sources in this area are widely scattered and often lack sufficient detail and process specificity to be useful at a screening level. They are better suited to in-depth analysis of specific industries. Factor 2 was considered, to the extent possible, during an additional screening-level step EPA applied to a limited set of industries with relatively high estimates of potential risk to human health or the environment. As discussed in the draft *Strategy* and in the preliminary Effluent Guidelines Program Plan for 2004/2005 this factor will also be considered more extensively in the forthcoming

detailed investigations.

***

2.0 Factor 2 Information Resources

EPA reviewed several industry- or technology-focused resources to identify additional industrial categories likely to have technology advances or process changes. These three resources are EPA's Office of Compliance Sector Notebooks, industry journals, and industry association publications and web sites, and are discussed in the following sections.

2.1 Office of Compliance Sector Notebooks

The Sector Notebook series is produced by the EPA's Office of Enforcement and Compliance Assurance (OECA) to provide users with a consolidated source of compliancerelated information for specific industry sectors. It is a set of industry profiles containing detailed sector-specific environmental information. Unlike many resource materials, which are organized by air, water, and land pollutants, the Notebooks provide a holistic, "whole facility" approach by integrating manufacturing process, applicable regulations, and other relevant environmental information. Sector Notebooks are available for a total of 23 industry sectors. Each Notebook includes the following information:

- Overview of the industry, including size,

geographic distribution, organizational structure, products, economic trends, and financial analysis;

- Description of manufacturing processes, including inputs of raw materials and pollution outputs;

- Summary of chemical releases to the environment;

- Summary of applicable federal statutes and regulations;

- Compliance and enforcement history;

- Review of major legal actions;

- Pollution prevention opportunities;

- Government and industry initiatives for compliance assurance; and

- Resource materials and contacts.

Sector Notebooks may be useful references for a more detailed look at specific industries identified for second-level screening.

2.2 Office of Wastewater Management's Clean Water Act Recognition Awards

The Office of Wastewater Management in EPA's Office of Water runs a program called "Clean

Water Act Recognition Awards. This program was formerly National Wastewater Management Excellence Awards Programs. Through this program, EPA recognizes municipalities, wastewater treatment programs, facilities, and individuals on a national level as examples of an outstanding commitment to protect and improve the quality of the nation's waters. The national winners have demonstrated exceptional technological achievements of innovative processes in their waste treatment and pollution abatement programs. National awards are presented for prominent accomplishments in innovative operations and maintenance; exemplary biosolids management; outstanding local pretreatment programs; and creative and cost-effective storm water and combined sewer overflow control programs and projects.

A compilation of winners for the period of 1986 through 2002 is available online at http://www.epa.gov/owm/pdfs/prevwinn86-02.pdf. Although these awards are plant specific, they may provide a starting place for identifying innovative technological advances in wastewater treatment. EPA intends to review the supporting documentation to determine whether this resource can be used in the detailed investigation phase of the current planning process.

2.3 Industry Journals

An important source of information on technology advances and process changes is industry journals and industry-focused literature. The scope

of available information made it difficult to utilize this resource in the screening level review phase. However, journals and other literature will be included in the detailed investigation phase of the current planning cycle.

2.4 Industry Association Publications and Web Sites

Another important source of information on technology advances and process changes is industry trade association publications and their web sites. The scope of available information made it difficult to utilize this resource in the screening level review phase. However, trade association resources will be included in the detailed investigation phase of the current planning cycle.

2.5 Industrial Wastewater and Best Available Treatment (BAT) Technologies Conference

EPA recently co-sponsored a technical conference with Vanderbilt University entitled *Industrial Wastewater and Best Available Treatment (BAT) Technologies: Performance, Reliability, and Economics*. Over the last 30 years, industries have accumulated much expertise and experience in wastewater treatment process design and operation to comply with effluent limitations guidelines and standards. This meeting provided a forum to share these experiences and lessons learned.

Representatives of academia, government, and industry shared information on water pollution control, including improvements to traditional wastewater treatment processes, process changes, and best management practices that lead to reductions in pollution.

Industries seek to meet effluent limitations guidelines and standards (and reduce production and treatment costs) by designing treatment systems appropriate for specific process wastewater characteristics and managing process water flow (including recycle-reuse). Although the types and quantities of pollutants generated varies from industry to industry, their treatment and pollution goals are similar: use waste minimization processes and the best treatment technologies available to minimize pollutant discharge. This section presents a brief overview of these technology advances, including biological treatment, filtration and membrane technologies, control of metals, and pollution prevention approaches.

2.5.1. Biological Treatment Processes

Advances in biological treatment are a result of regulatory initiatives to control nutrients (nitrogen and phosphorous), multimedia approaches to control volatile organic pollutant emissions, and the need for treatment systems to handle higher organic pollutant loadings. Although new operating techniques and equipment have been developed to meet these challenges, basic biological treatment

principals including pretreatment and equalization are a necessity for optimum performance. Pretreatment of biological system influent (including sedimentation, flotation, precipitation, stripping, and ion exchange) lessens the amount of non-degradable solids entering the system, removes toxic constituents which can slow bacterial metabolic activity, and prevents the introduction of constituents that impede solid-liquid separation. Equalization dampens both flow and organic loads to the biological treatment system, creating consistent feed to microorganisms (F/M) ratios and preventing solids wash-out from clarification systems.

Improvements to typical treatment technologies may occur due to site-specific issues such as water quality-based effluent limitations, local water concerns, land availability, materials recycle, and economics. For example, a chemicals manufacturing company implements anaerobic technologies in Europe and Asia because energy and sludge disposal costs are more significant there than in the US. A pulp and paper mill that does not have large amount of level land in proximity to the manufacturing area cannot use the common practice of treating wastewater in large aerated stabilization basins. Instead, the mill has developed methods to achieve maximum BOD and TSS reduction with only hours of detention in the biological reactor.

The remainder of this section presents a summary of the operational or equipment changes that have been made to full-scale biological treatment systems to enhance nutrient removal,

control air emissions, and allow for stable treatment of high-strength organic wastewater.

Biological Nutrient Removal (BNR).

Conventional activated sludge wastewater treatment systems can be modified to remove ammonia, nitrate and organic nitrogen, and total phosphorus, while continuing to remove BOD and other organic pollutants. To remove total nitrogen, an anoxic zone is created in the system by either adding a new tank prior to the aeration basin or by isolating a portion of the aeration tank using a constructed barrier. Nitrate, formed in the aerobic portion of the system from conversion of both free ammonia and organically bound nitrogen, is recycled with a portion of the system effluent to the anoxic tank where it is converted to nitrogen gas.

Phosphorus can be removed using conventional activated sludge systems by installing an anaerobic tank prior to the anoxic denitrification tank and the aerated activated sludge tank In the anaerobic tank, in-coming raw wastewater is mixed with biomass in the absence of oxygen, causing the biomass to rapidly uptake BOD and release phosphate. Phosphate from the anaerobic tank enters the aerobic portion of the treatment system where it is incorporated back into the biomass during cell synthesis. Phosphate is removed from the treatment system via sludge wasteage.

Some facilities have also implemented sustainable development projects utilizing BNR for

the control of nutrients. Organic chemicals manufacturing operations have wastewaters with high levels of nitrate and carbonaceous content. Treatment operations comprised of BNR, a constructed wetland, and land application (for beneficial reuse of biosolids) has resulted in removals of COD above 99 percent, and virtually complete removal of nitrate and nitrite.

BNR may also be applicable for treatment of wastewater generated by hospitals and at industrial organic chemicals manufacturing facilities. Hospital waste contains nitrogen compounds found in pharmaceutical and personnel care products, while industrial organic chemicals manufacturing facilities use a variety of raw materials including phosphoric acid, ammonia, and nitric acid.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 08-225

In the Supreme Court of the United States

OUR CHILDREN'S EARTH FOUNDATION AND ECOLOGICAL RIGHTS FOUNDATION, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Environmental Protection Agency had a nondiscretionary duty, enforceable in a citizen suit under 33 U.S.C. 1365(a)(2), to consider technology-based factors when reviewing its effluent limitation guidelines for possible revision under Sections 301(d) and 304(b) of the Clean Water Act, 33 U.S.C. 1311(d), 1314(b).

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OUR CHILDREN'S EARTH FOUNDATION AND ECOLOGICAL RIGHTS FOUNDATION, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-23a) is reported at 527 F.3d 842. An earlier, withdrawn opinion of the court of appeals (Pet. App. 24a-58a) is reported at 506 F.3d 781. The opinion of the district court (Pet. App. 59a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2008. The petition for a writ of certiorari was filed on August 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 505 of the Clean Water Act (CWA) allows any citizen to bring a civil action against the Administrator of the United States Environmental Protection Agency (EPA) "where there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is not discretionary with the Administrator." 33 U.S.C. 1365(a)(2). As with similar statutory provisions, in order to be nondiscretionary and thus enforceable via the citizen-suit provision, a duty must be a "clear-cut" obligation or a "specific, unequivocal command."[1] See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("The mandamus remedy [after which Congress modeled 5 U.S.C. 706(1)] was normally limited to enforcement of 'a specific, unequivocal command.'"); *Sierra Club* v. *Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (requiring a nondiscretionary duty to be "clear-cut"); *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 766 (10th Cir. 1980) ("Congress thus restricted citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act."), cert. denied, 450 U.S. 1050 (1981). See also *Maine* v. *Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *City of Seabrook* v. *Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981); *Sierra Club* v. *Train*, 557 F.2d 485, 488 (5th Cir. 1977); *NRDC* v. *Train*, 510 F.2d 692, 699-700 (D.C. Cir.

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[1] Because Congress modeled the CWA's citizen-suit provision after a provision in the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, see *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987); *NRDC* v. *Train*, 510 F.2d 692, 699 (D.C. Cir. 1975), cases interpreting that statute are instructive. So are cases interpreting an analogous provision of the Administrative Procedure Act (APA), 5 U.S.C. 706(1), which allows a citizen to maintain an action to compel agency action unlawfully withheld or unreasonably delayed.

1975). Moreover, a citizen suit may challenge only an agency's failure to perform a nondiscretionary duty, not the method by which the duty is performed. See *Southern Utah Wilderness Alliance*, 542 U.S. at 64-65; *Maine*, 874 F.2d at 888; *Farmers Union Cent. Exch., Inc.* v. *Thomas*, 881 F.2d 757, 760-761 (9th Cir. 1989); *City of Las Vegas* v. *Clark County*, 755 F.2d 697, 704 (9th Cir. 1985); *Scott* v. *City of Hammond*, 741 F.2d 992, 995 (7th Cir. 1984); *Pennsylvania Dep't of Envtl. Res.* v. *EPA*, 618 F.2d 991, 995-996 (3d Cir. 1980); *Sun Enters., Ltd.* v. *Train*, 532 F.2d 280, 286-288 (2d Cir. 1976); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 664-665 (D.C. Cir. 1975).

2. As relevant here, petitioners' complaint in the United States District Court for the Northern District of California alleged that in 2003 and 2004, EPA failed to satisfy its purportedly nondiscretionary duties under Sections 301(d) and 304(b) of the CWA to consider technology-based factors when reviewing its effluent limitation guidelines.

Section 301 of the CWA addresses EPA's review of effluent limitations. It states in relevant part:

> Any effluent limitation * * * shall be *reviewed* at least every five years *and, if appropriate, revised* pursuant to the procedure established under [paragraph (b)(2)].

33 U.S.C. 1311(d) (emphases added). The cross-referenced provision requires point sources of pollutants that are discharged into navigable waters to achieve effluent limitations that reflect the application of the best available technology that is economically achievable or the best conventional pollutant-control technology. 33 U.S.C. 1311(b)(2).

Section 304(b) of the CWA governs EPA's guidelines for effluent limitations and begins as follows:

> For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, *revise, if appropriate,* such regulations.

33 U.S.C. 1314(b) (emphasis added). The rest of Section 304(b) makes clear that the initial adoption and later revisions of effluent limitation guidelines must be based on factors specified in Section 304(b). 33 U.S.C. 1314(b)(1)(B), (2)(B), and (4)(B). Although Section 304(b) specifies the factors that EPA must consider when it actually *adopts* or *revises* effluent limitation guidelines, neither Section 304(b) nor Section 301(d) specifies the factors EPA is to consider when it conducts its reviews of existing guidelines to identify appropriate candidates for revision.

Pursuant to Sections 301 and 304, EPA reviewed its effluent limitation guidelines in 2003 and 2004.[2] Pet. App. 72a. The agency prioritized its reviews according to the quantity of discharges weighted by the hazard they posed to the environment. Petitioners alleged, however, that EPA's review was deficient because the

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[2] Since the 1970s, EPA has implemented Sections 301 and 304 through the promulgation of consolidated "effluent limitation guidelines," rather than by establishing technology-based categorical effluent limitations independently of its effluent guidelines regulations. Pet. App. 14a; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 124 (1977).

CWA requires the prioritization to take account of technology-based factors that EPA allegedly failed to consider. *Ibid.* Petitioners further contended that EPA's failure to consider those factors constituted the failure to perform a nondiscretionary duty. See *id.* at 71a.

3. EPA moved to dismiss the complaint for lack of jurisdiction. The government contended that petitioners' claims amounted to an impermissible challenge to the substance of EPA's review (as opposed to a challenge to an alleged failure to conduct a review) and that such a challenge could not be addressed through a citizen suit, which must seek to enforce a nondiscretionary duty. 33 U.S.C. 1365(a)(2).

The district court entered judgment in favor of EPA, granting in part and denying in part the motion for judgment on the pleadings, and granting summary judgment as to the remaining issues. Pet. App. 59a-73a. The district court found that its jurisdiction was "limited to a review of the discharge of the EPA's statutory duties and [did] not reach questions that would amount to a substantive review of the 2004 [Effluent Guidelines Plan]." *Id.* at 73a. The court analyzed whether EPA, in conducting the annual reviews of all existing effluent limitation guidelines in 2003 and 2004, had met its nondiscretionary duties under Sections 301(d) and 304(b), or whether, as petitioners asserted, EPA could discharge its duties only by conducting those reviews in accordance with certain technology-based factors. The district court held that the CWA does not mandate a technology-based review or any other form of review, but rather accords the agency broad discretion to determine how to conduct its reviews. *Id.* at 69a-70a. The court concluded that, by conducting the required annual reviews in 2003 and 2004, EPA had discharged any non-

discretionary duties under Sections 301(d) and 304(b). *Id.* at 70a-71a.

4. In an opinion that has since been withdrawn, a divided panel of the court of appeals initially reversed and remanded. Pet. App. 24a-56a. The court concluded that "[t]he district court had jurisdiction under [Section] 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA." *Id.* at 32a. The court employed the framework from *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), to determine whether EPA had a nondiscretionary duty under Sections 301(d) and 304(b) to consider specific technology-based factors when reviewing its effluent limitation guidelines for potential revision. Pet. App. 32a-34, 42a-43a. Under the first step of the *Chevron* analysis, the court concluded that the statute's "plain language" clearly "mandates a technology-based approach as a non-discretionary matter" in the *adoption* and *revision* of effluent limitations. *Id.* at 42a. But it could not reach the same result under *Chevron* step one with regard to *reviewing* the limitations and guidelines. Although it concluded that "the overall structure of the [CWA] strongly counsels that any review to determine whether revision is appropriate must contemplate" technology-based factors, the court recognized that "the statute does not expressly and unequivocally state as much." *Id.* at 43a. The court therefore proceeded to analyze the CWA's structure and legislative history under *Chevron* step two, concluding that it would be "unreasonable" for EPA to "totally ignore technology as part of its annual review." *Ibid.* The court concluded that, "[t]o the extent the EPA has completely abandoned a technology-based review in favor of a hazard-based review, the Agency has breached its mandatory duties," and the

court remanded for a determination of whether EPA had in fact considered technology. *Id.* at 51a.

Judge Wallace dissented in part. Pet. App. 56a-58a. He would have held that the CWA does not clearly mandate consideration of specific technology-based factors during review of the effluent limitation guidelines. *Id.* at 58a. He concluded that, because the CWA does not unambiguously require EPA to consider certain technology-based factors in its review of the effluent limitation guidelines, petitioners had failed to identify "a clear-cut, mandatory duty on the part of the EPA" that could be enforced through a citizen suit. *Ibid.*

5. The federal respondents filed a petition for panel rehearing or rehearing en banc. The court of appeals granted panel rehearing and withdrew its earlier opinion. Pet. App. 3a. In its revised opinion (*id.* at 1a-23a), the court held, in relevant part, that "[n]othing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach. At most, the statutory provisions and legislative history are ambiguous." *Id.* at 19a. The court further explained that there was no need to invoke *Chevron* analysis in this context because "we are not trying to determine whether we should defer to the EPA's interpretation of the statute, but are trying to determine whether, objectively, the statute creates a mandatory duty." *Id.* at 20a; see also *ibid.* ("the statute falls short of imposing a mandatory duty and thus the review criteria are not properly before the court under [Section] 505(a)(2)").

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 2, 14-16, 18-20, 27) that the court of appeals created an intra-circuit conflict or split by withdrawing its initial opinion *in this case* and issuing a revised opinion. Petitioners even imply (Pet. 24) that the court's revised opinion is inconsistent with portions of the initial opinion that were purportedly "left intact" because the revised opinion did not expressly "reverse or criticize" them. But differences between an opinion that has been "withdrawn" and "replaced" in its entirety (Pet. App. 3a) and a revised opinion from the same panel do not create an intra-circuit split. And, even if they did, an intra-circuit conflict would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").[3]

2. Petitioners contend that their challenge is cognizable under the CWA's citizen-suit provision because "EPA's nondiscretionary duty includes considering technology-based factors in reviewing" its effluent limitation guidelines. Pet. 25 (capitalization modified). Petitioners do not and could not assert, however, that there is any

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[3] For the same reason, any conflict between the Ninth Circuit's decisions in this case and in *San Francisco Baykeeper* v. *Whitman*, 297 F.3d 877 (9th Cir. 2002), would provide no basis for this Court's review. In any event, *San Francisco Baykeeper* did not directly consider whether analysis under *Chevron*'s second step is appropriate in cases involving nondiscretionary duties, and it predates this Court's decision in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004), on which the court of appeals relied in this case, Pet. App. 20a.

circuit split on that question (*i.e.*, on the actual holding of the court of appeals on the merits of this case). Instead, petitioners focus on the court of appeals' methodology, claiming (Pet. 18) that the court failed to employ "traditional tools of statutory construction and/ or the *Chevron* second step framework" in determining the extent of EPA's nondiscretionary duties. The court of appeals' mode of analysis was appropriate and created no conflict with another court of appeals.

Petitioners repeatedly assert (Pet. 20-23) that the decision below conflicts with cases from other circuits because the Ninth Circuit purportedly rejected the use of "extrinsic aids" such as legislative history when construing the statute. In fact, the court of appeals plainly took legislative history into account. It specifically concluded that "the statutory provisions *and legislative history* are ambiguous." Pet. App. 19a (emphasis added); see also *id.* at 20a (referring to "an amalgamation of disputed statutory provisions and legislative history").

Petitioners also attack (Pet. 18-22) the court of appeals' statement that the *Chevron* framework is inapplicable when determining whether the CWA imposes a clear-cut, nondiscretionary duty on EPA. While the analysis in the first step of *Chevron* is similar to that necessary to determine whether a statute imposes a nondiscretionary duty on an agency, the second step is generally irrelevant to such a determination. A nondiscretionary duty exists only where the statute imposes "clear-cut" obligations or "specific, unequivocal commands"—in other words, where the statute is unambiguous. See pp. 2-3, *supra*. When a court has concluded that a statute is ambiguous for purposes of *Chevron* step one, its analysis necessarily implies that no nondis-

cretionary duty exists. *Chevron*'s second step—which requires courts to defer to an agency's reasonable interpretation of an *ambiguous* statute—is therefore inapposite in this setting. As the court of appeals concluded, in a nondiscretionary-duty lawsuit, the question is not, as in the second step of *Chevron* analysis, whether an agency reasonably believes it has a nondiscretionary duty to do something, but whether the statute creates an unambiguous nondiscretionary duty. Pet. App. 20a.

The out-of-circuit cases that petitioners identify (Pet. 20-21) do not contradict that conclusion.[4] None of them held that an agency acted unreasonably in construing an *ambiguous* statute as not imposing a nondiscretionary duty. See *Monongahela Power Co.* v. *Reilly*, 980 F.2d 272, 279 (4th Cir. 1992) (finding agency's interpretation is "reasonable"; "[w]here, as here, * * * Congress' silence gives rise to ambiguity as to its wishes, the administering agency is not required to adopt any particular interpretation from among the plausible alternatives"); *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 900 (2d. Cir. 1989) ("Congress's intent that the Administrator make some decision is clear.") (emphasis omitted); *Dubois* v. *Thomas*, 820 F.2d 943, 951 (8th Cir. 1987) ("In light of the language of the statute and its legislative history, it is clear that the Administrator's interpretation is permissible.").[5] The Fourth Circuit did

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[4] Petitioners cite (Pet. 21) several decisions of federal district courts as contributing to the alleged conflict, but such decisions do not create the sort of conflict that justifies a writ of certiorari. See Sup. Ct. R. 10(a).

[5] Petitioners also cite (Pet. 21-22) *NRDC* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975), for the proposition that an agency's discretion can be "rein[ed] in" even when a statute is ambiguous. As the D.C. Circuit has since explained, however, *Train* did not even resolve the question of

state in dicta in *Monongahela Power Co.* that, consistent with *Chevron*, "the Administrator" could "[p]resumably" interpret "an ambiguous statute so as to impose a non-discretionary duty" on EPA. 980 F.2d at 278 n.6. But that is not the situation here, because EPA has never construed the CWA to impose a nondiscretionary duty on the agency to consider technology-based factors in reviewing its guidelines.[6] Petitioners would effectively turn *Chevron* deference on its head by seeking a determination that *their* interpretation (rather than the agency's) is a reasonable one that deserves judicial deference.

3. Petitioners criticize (Pet. 26-27) the court of appeals for failing to address EPA's argument that the reviews in question are not sufficiently "discrete" actions to be reviewable. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64, 66, 72 (2004). Petitioners, however, have not alleged that EPA failed to perform its annual reviews at the times required by law. Nor do petitioners challenge EPA's decision not to re-

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whether EPA's duty to publish guidelines by December 31, 1974, was "a nondiscretionary duty covered by the 'citizen suits' provision for district court review." *Sierra Club* v. *Thomas*, 828 F.2d 783, 789 (1987). In *Sierra Club*, the D.C. Circuit held that, even though "there may be isolated occasions when, upon extensive analysis, one can conclude that an inferrable deadline imposes a mandatory duty of timeliness," there is no district court jurisdiction over a citizen suit under Section 304 of the Clean Air Act, 42 U.S.C. 7604, unless the deadline is "readily-ascertainable from the statute" itself. *Sierra Club*, 828 F.2d at 791-792.

[6] The court of appeals referred to "EPA's own earlier interpretation" of Sections 301 and 304. Pet. App. 20a (citing *Preliminary Effluent Guidelines Plan for 2004-2005*, 68 Fed. Reg. 75,520 (2003)). But the statements it apparently had in mind simply show that EPA had in fact planned, *in its discretion*, to consider technology-based factors in its upcoming annual reviews.

vise a specific effluent limitation guideline, or to take any other *discrete* action. Instead, petitioners challenge the manner in which EPA performed its review—a kind of challenge that is not cognizable in a nondiscretionary-duty lawsuit. See p. 3, *supra*. Thus, although the court of appeals did not reach this issue, the absence of a discrete agency action in this case would provide an alternative ground for affirmance, and thus furnishes an additional reason to deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EFFLUENT GUIDELINES INDUSTRY COALITION

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QUESTION PRESENTED

Whether EPA has a non-discretionary duty to conduct a technology-based approach in reviewing effluent limitation guidelines and effluent limits under sections 301(d), 304(b), and 304(m) of the Clean Water Act. 33 U.S.C. §§ 1311(d), 1314(b) & (m).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Effluent Guidelines Industry Coalition ("EGIC") makes the following disclosure:

EGIC does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of EGIC's stock. EGIC states that its members are made up of numerous industrial entities and trade associations that own and operate (or have members that own and operate) regulated industrial facilities located in the United States. EGIC's members include, but are not limited to, such entities as the American Petroleum Institute and the American Forest and Paper Association.

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RULE

Fed. R. App. P. 35(a) 4

OPINIONS BELOW

The Ninth Circuit decision at issue is reported at 527 F.3d 842 (9th Cir. 2008). That decision resulted from a grant of a petition for panel rehearing, and the Ninth Circuit provided that its earlier decision reported at 506 F.3d 781 (9th Cir. 2007) was withdrawn and replaced. App. at 3a.[1]

STATEMENT OF THE CASE

On October 29, 2007, the Ninth Circuit ruled that EPA has a mandatory duty to use a technology-based approach in reviewing effluent limitation guidelines and effluent limitations ("ELGs") under sections 301(d), 304(b), and 304(m) of the Clean Water Act (the "CWA"). App. at 51a-52a. Because of that mandatory duty, the Ninth Circuit found that Petitioners could bring a citizen suit under CWA § 505(a)(2) to enforce EPA's nondiscretionary duties. *See* 33 U.S.C. § 1365(a)(2). In response to the Ninth Circuit's decision, EPA timely filed a petition for rehearing *en banc* on January 24, 2008.

On May 23, 2008, the Ninth Circuit panel granted rehearing. App. at 3a.[2] The Ninth Circuit panel stated:

> The opinion filed October 29, 2007, slip op. 14215, and appearing at 506 F.3d 781, is withdrawn. It may not be cited as precedent by or to this court or any district court of the

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1. Citations to "App. at _a," are to the Appendix attached to the Petition for Writ of Certiorari.

2. The Ninth Circuit panel denied the petition for rehearing *en banc* as moot. App. at 3a.

> Ninth Circuit. It is replaced by the concurrently filed opinion.

Id. The Ninth Circuit held that CWA §§ 301(d), 304(b), and 304(m) do not expressly mandate EPA to use a technology-based approach to review ELGs. App. at 19a ("Nothing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach.") (emphasis in original). As a result, the Ninth Circuit found that the CWA provisions at issue fall "short of imposing a mandatory duty and thus the review criteria are not properly before the court under § 505(a)(2)" of the CWA. App. at 20a.[3] On August 21, 2008, Petitioners filed a petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

The Ninth Circuit decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners argue that review is appropriate because of an intra-circuit conflict of authority. That argument lacks merit. Petitioners argue the flawed premise that "*OCE II* improperly reversed *OCE I*'s holding . . ." thereby creating a split in the Ninth Circuit because *OCE II* is "contrary to [the Ninth Circuit's] ruling in *OCE I* . . ." Pet. at 2. *OCE II*, however, did not

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3. For purposes of clarity, EGIC will refer to the Ninth Circuit's initial withdrawn opinion as *OCE I*, and its subsequent opinion on rehearing as *OCE II*. However, EGIC makes no admission that *OCE I* is a viable opinion, as it has been withdrawn and no longer exists. App. at 3a.

reverse *OCE I*, but rather it withdrew and replaced *OCE I*, rendering the first decision a nullity. As stated in *OCE II*, "[*OCE I*] is withdrawn. It may not be cited as precedent by or to this court of any district court of the Ninth Circuit. It is replaced by the concurrently filed opinion [*i.e.*, *OCE II*]." App. at 3a. Instead of reversing *OCE I*, *OCE II* withdrew its previous decision, rendering *OCE I* a nonexistent opinion that can no longer be cited as precedent. Petitioner's argument of an intra-circuit split is fundamentally faulty as *OCE II* cannot conflict with a nonexistent decision. Thus, Petitioners' assertion of an intra-circuit split fails because *OCE I* is a non-opinion. There is no intra-circuit split in the Ninth Circuit on the issue of whether EPA has a non-discretionary duty to conduct a technology-based approach in reviewing ELGs under CWA §§ 301(d), 304(b), and 304(m). The Ninth Circuit has established *OCE II* as the only controlling authority on that issue.

Moreover, even assuming *arguendo* that there is an intra-circuit conflict as asserted by Petitioners, such a conflict is insufficient to warrant review. Rule 10 of the Court's rules provides the "character of the reasons the Court considers" in determining whether to grant a petition for writ of certiorari as conflicts between 1) two different circuit courts of appeals; 2) a court of appeals and a state court of last resort on an important federal question; 3) two different state courts of last resort on an important federal question; or 4) a state court or court of appeals and this Court on an important federal question. S. Ct. R. 10(a) - (c). An intra-circuit conflict is not listed. Instead, Federal Rule of Appellate Procedure 35(a) provides the mechanism for resolving intra-circuit disputes through *en banc* or panel rehearing, which is

"ordinarily . . . not ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions . . ." Fed. R. App. P. 35(a). The Ninth Circuit was capable of resolving any conflict and maintaining uniformity in its intra-circuit authority that may have occurred from issuing two opinions in this case. Indeed, *OCE II* clarified the Ninth Circuit's exact position on EPA's duties under CWA §§ 301(d), 304(b), and 304(m). App. at 3a. As provided above, the Ninth Circuit resolved any issues that could have resulted in a conflict by withdrawing *OCE I* and replacing it with *OCE II*. Petitioners' assertions about an intra-circuit split fail to support review of this case.

2. Petitioners also claim that review is appropriate to resolve an inter-circuit conflict. That claim is not persuasive. Petitioners do not cite to any case from another circuit court of appeals that involves an interpretation of CWA §§ 301(d), 304(b), and 304(m) related to the issue at bar, so there is no conflict between the Ninth Circuit decision and a decision of another circuit. Petitioners argue that in *OCE II*, the Ninth Circuit failed to employ "traditional principles of statutory construction and/or a *Chevron* second step analysis" in interpreting CWA §§ 301(d), 304(b), and 304(m). Pet. at 20. Petitioners then list numerous cases from other circuits that interpreted different statutory provisions under the CWA and the Clean Air Act to find that EPA had mandatory duties under those provisions. *Id.* at 20-21. Those decisions do not create a conflict with the Ninth Circuit decision that examined the scope of CWA §§ 301(d), 304(b), and 304(m). Instead, Petitioners merely show that there are other circuit courts that

interpreted entirely different statutory language in other environmental provisions than those involved in this case, and found that those provisions imposed mandatory duties on EPA. In *OCE II*, the Ninth Circuit correctly interpreted CWA §§ 301(d), 304(b), and 304(m) based on the plain language of the statutory provisions. Petitioners have shown nothing more than the fact they dislike *OCE II*'s ruling and would have preferred that the Ninth Circuit impose a non-discretionary duty.

The Ninth Circuit ruled on an issue of first impression (thus, it could not create an inter-circuit split): whether EPA is mandated to conduct a technology-based approach in reviewing ELGs under CWA §§ 301(d), 304(b), and 304(m). App. at 19a-20a. The Ninth Circuit found that based on the plain language of the CWA provisions, "[n]othing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach." *Id.* at 19a (emphasis in original). The Ninth Circuit then found that because of the absence of any express provision compelling EPA to conduct a technology-based approach, Petitioners could not bring a citizen suit to compel mandatory action under CWA § 505(a)(2). *Id.* at 19a-20a. The Ninth Circuit further stated that it was not conducting a full *Chevron* analysis because it was not determining whether to defer to EPA's interpretation of a statute, but only determining whether CWA §§ 301(d), 304(b), and 304(m) create a mandatory duty, such that a citizen suit could be filed under CWA § 505(a)(2). *Id.* at 20a. This analysis was not error, let alone a decision that conflicts with other courts of appeal, as the Ninth Circuit found that the plain

language of CWA §§ 301(d), 304(b), and 304(m) lacked the express and unequivocal language that is necessary to trigger a mandatory duty that could be subject to a CWA § 505(a)(2) suit. This interpretation followed the bedrock construction principle that the courts must follow the plain language of a statute. *See Barnhart v. Sigmon Coal Co. Inc.*, 534 U.S. 438, 461-62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Thus, the Ninth Circuit correctly interpreted CWA §§ 301(d), 304(b), and 304(m). Petitioners fail to establish an inter-circuit split that would justify review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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